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Nos. 90-1604 and 90-1606

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In the Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
PETITIONERS

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1035(a)(1), which preempts "any" state laws "relating to rates, routes, or services of any air carrier," preempts state regulation of air fare advertising.

2. Whether a case or controversy exists between respondents and States that have not brought or threatened to bring an enforcement action against respondents for their air fare advertising.

3. Whether States not named as parties in the complaint waived their objection to personal jurisdiction by opposing a temporary restraining order.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. The National Association of Attorneys General (NAAG) is a voluntary association, comprised of representatives of the attorneys general of the 50 States, various territories, and the District of Columbia. In 1987, a NAAG task force undertook a study of advertising and marketing practices in the airline industry with an eye to consumer concerns in the areas of airline advertising, frequent flyer programs, and compensation for denied boarding. Pet. App. 36a.[1] Following that study, in December 1987, NAAG adopted Air Travel Industry Enforcement Guidelines. See National Ass'n of Attorneys General, Task Force on the Air Travel Industry, *Guidelines and Commentary* (Apr. 1988) (*NAAG Guidelines*), App. B, *infra*. The *NAAG Guidelines*, which are not law, purport to explain in detail how state consumer protection laws apply to, inter alia, air fare advertising. *Id.* introduction.

The *NAAG Guidelines* provide that any print or broadcast advertisement which "provides air fares or other price information" must be in "clear and conspicuous" language and be non-deceptive. *NAAG Guidelines* § 2.0. Deception may result from omitting or obscuring a "material restriction." *Ibid.* The *NAAG Guidelines* specify what is "clear and conspicuous." § 1.5. In printed advertisements, disclosure must be of a certain type size, depending on the size of the advertisement. § 1.5(a). In radio and television commercials, disclosure must be "made orally and [be] as clear and understandable in pace and volume as the fare information." § 1.5(b). A "[m]aterial restriction" is defined as any restriction, limitation or requirement "which affects the use or refundability of a ticket, and which is not generally applicable to all classes of fares or tickets (such as standard conditions of carriage.)." § 1.8. The *NAAG Guidelines* set

[1] "Pet. App." refers to the appendix to the certiorari petition in No. 90-1604.

forth a detailed list of restrictions that must appear in print advertisements, § 2.1, and a separate list of disclosures that must be made in broadcast commercials, § 2.2. Additionally, the *NAAG Guidelines* require that the "total advertised price" must include any fuel, tax, or other surcharge, § 2.5; that if the advertised one-way price is available only as part of a round-trip purchase, "this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare," § 2.6; and that certain restrictions must be observed on use of the words "sale," "discount," "reduced," or similar terms, § 2.7. Finally, the *NAAG Guidelines* contain detailed requirements for frequent flyer programs, §§ 3.0-3.9, as well as offers of compensation to persons for voluntarily denied boarding, § 4.0.

2. a. In February 1988, the attorneys general of Texas, Colorado, Kansas, Massachusetts, Missouri, New York, and Wisconsin jointly announced that they intended to "bring airline advertisements into compliance with standards in the [NAGG] Guidelines for fare advertising." 2 R. Exh. H, Att. A. In November 1988, the attorneys general of Texas, California, Massachusetts, New York, and Washington notified respondents Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental), and British Airways PLC (British Air) in a letter that some of their advertisements violated the *NAAG Guidelines* and the States' false advertising and deceptive practices laws by prominently advertising the ticket price while less prominently disclosing taxes, surcharges, and fees. The letter threatened prosecution. Pet. App. 15a.

b. On January 23, 1989, three respondents, TWA, Continental, and British Air,[2] brought this action. Pet.

[2] The remaining airlines-respondents intervened in this case at a later point. Pet. App. 16a. For the sake of convenience, we will refer to the original plaintiffs and the plaintiff-intervenors collectively as respondents.

App. 37a. Respondents claimed that Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), which prohibits a State from enacting or enforcing any state law "relating to rates, routes, or services," preempted the Texas Deceptive Practices Consumer Protection Act, Tex. Bus. & Comm. Code §§ 17.41 *et seq.* (Vernon 1991), and that enforcement of the *NAAG Guidelines* through state law would violate the Commerce Clause, Art. I, § 8, Cl. 3; the Compact Clause, Art. I, § 10, Cl. 3; and the First Amendment. Compl. 11-26 (filed Jan. 23, 1989); App. C, *infra*. The Texas Attorney General was the only named defendant, *id.* at 43a, but respondents alleged that he was acting "in concert with" and "on behalf of" other attorneys general, *id.* at 44a, and that Texas law and "any other states' laws" were invalid when construed with the *NAAG Guidelines*, Compl. paras. 33, 45, 49-50, 55-57; App. C, *infra*, 55a, 59a, 60a, 61a-62a. Respondents sought a declaratory judgment that implementation or enforcement of the *NAAG Guidelines* "through Tex. Bus. & Com. Code § 14.71 *et seq.* or any other state law is unconstitutional," Compl. 25-26; App. C, *infra*, 62a-63a, and an injunction against the Texas attorney general "and all other persons acting for or in active concert or participation with [him]", *id.* at 63a-64a. Respondents also sought a temporary restraining order. Pet. App. 37a.

Because of respondents' theory that various state attorneys general were acting "in concert" with the Texas attorney general and because of the phrasing of respondents' request for injunctive relief, other States became concerned that the temporary restraining order sought by respondents would reach beyond the State of Texas and would apply to them. Accordingly, four days after respondents filed their complaint, the attorneys general of 33 States filed a motion in district court asking the court to deny the TRO. Pet. App. 38a.[8] In the opening

[3] Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Order (filed Jan. 27, 1989) (hereinafter Motion). Because of its importance to the case, we have reprinted the motion as Appendix D to this brief.

line of their motion, the 33 States said that it was filed "[w]ithout admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them," App. D, *infra*, 65a. The 33 States argued that respondents' motion for a TRO should be denied "because the injunctive relief [respondents] are seeking could affect the sovereign rights of states which have neither been served nor named as defendants in the instant action." *Id.* at 66a. In the alternative, the 33 States asked for a reasonable postponement of the TRO hearing to allow the States time to respond and "to decide whether to seek leave from this Court to file an Amicus Curiae Brief or to seek leave to intervene." *Id.* at 68a.

Following a hearing, at which one representative of the 33 States participated, the district court granted a preliminary injunction, ruling that respondents were likely to prevail on their preemption claim. Pet. App. 48a-50a. The injunction, however, enjoined not only the Texas attorney general but also "all other persons acting in concert or participation" with him under "Tex. Bus. & Comm. Code § 17.41 *et seq.*, or any other provision of state law." *Id.* at 50a. The Kansas attorney general thereafter filed a motion on his own behalf seeking to clarify that the preliminary injunction was limited to Texas and Texas law. Shortly thereafter, the district court granted this motion. Pet. App. 51a.

c. Respondents later moved to broaden the preliminary injunction to cover the 33 States on the grounds that they were acting "in concert" with Texas; that, by their prior actions in the case, the 33 States had "*de facto* intervened" in this suit; and that suits brought by some attorneys general after the court granted the clarification motion filed by the Kansas attorney general action threat-

ened to injure respondents. Pet. App. 58a. The court granted respondents' motion, ruling that the presence of the 33 States was necessary to resolve the controversy between respondents and all of the States. *Id.* at 58a-60a. The court expressly declined to accept respondents' claim that the 33 States should "be *deemed* intervenors"; instead, the court joined the States under Rule 19, Fed. R. Civ. P. Pet. App. 60a.

3. The court of appeals affirmed. Pet. App. 13a-47a; *TWA* v. *Mattox*, 897 F.2d 773 (5th Cir.), cert. denied, 111 S. Ct. 307 (1990). At the outset, the court upheld the district court's judgment that respondents were likely to prevail on their preemption claim. The court reasoned that, under Section 105(a)(1) of the Airline Deregulation Act of 1978, Congress had expressly preempted all state regulation of matters that "relate to" air fares, and that air fare advertising relates to air fares. In that regard, the court agreed with the Seventh Circuit that air fare advertising relates to air fares under Section 105 (a)(1) because "[p]rice advertising surely 'relates to' price." *Illinois Corporate Travel* v. *American Airlines*, 889 F.2d 751, 754 (1989), cert. denied, 110 S. Ct. 1948 (1990). Pet. App. 32a-33a.

The court of appeals also concluded that the 33 States other than Texas were properly enjoined. Pet. App. 41a-43a. The court did not decide whether the district court properly joined the 33 States under Fed. R. Civ. P. 19; instead, the court of appeals held that, by their actions, the 33 States had become "de facto" intervenors. The court reasoned that respondents had filed suit and sought relief against only the Texas attorney general when he was acting under Texas law, but the 33 States nonetheless "filed a motion asking the district court to deny [respondents'] motion for a TRO against enforcement of Texas laws," which the court described as a request for "affirmative relief," *i.e.*, "an affirmative act by the [district] court that would benefit their states." Pet. App. 42a. The court stated that while a party could

object to personal jurisdiction either in a pre-answer motion or in the answer itself, the 33 States were not parties when they filed their motion. For that reason, the court said that the 33 States "had no basis for objecting to the court's jurisdiction as they had not been named defendants and no attempt had been made to bring them before the court by process." *Ibid.* At the same time, the court said that the 33 States "became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf." *Ibid.* By so doing, the court held, the 33 States "waived any objection to the jurisdiction of the court over their persons as representatives of their respective states." *Id.* at 43a.

Texas and the 33 States sought review in this Court, but this Court denied certiorari. 111 S. Ct. 307, 308 (1990).

4. Thereafter, the district court entered a final injunction against all 34 States, ruling that Section 105 (a)(1) of the Airline Deregulation Act of 1978 preempted the Texas Deceptive Trade Practices Act and the similar laws of the other 33 States as applied to the regulation of airline fare advertisements. Pet. App. 8a-12a. The court of appeals affirmed on the basis of its earlier opinion. *Id.* at 1a-7a.

DISCUSSION

The court of appeals was correct in holding that Section 105(a)(1) of the Airline Deregulation Act of 1978 preempts the use by Texas of its consumer protection laws to enforce the *NAAG Guidelines* against airline fare advertisements. There is no federal appellate decision to the contrary. Moreover, if the injunction challenged in No. 90-1606 is reversed, as we believe it should be, there will be even greater opportunity for other courts to address the Section 105(a)(1) preemption issue. Accordingly, the petition for a writ of certiorari in No. 90-1604 should be denied.

At the same time, the Fifth Circuit clearly erred in upholding the injunction insofar as it applied to the other 33 States. Although the 33 States were not named in or served with respondents' complaint, the complaint could reasonably be read to have sought to have the 33 States enjoined. Out of reasonable caution and prudence, the 33 States filed a motion in which—after expressly noting their objection to personal jurisdiction—they asked only that the TRO be denied or that the hearing be postponed so that they could decide how best to respond. Such actions cannot remotely be deemed a waiver of the 33 States' objection to personal jurisdiction, and the Fifth Circuit's holding to the contrary is clearly wrong. In fact, the court of appeals' error is so obvious that this Court should grant the petition in No. 90-1606 limited to Question 2 and summarily reverse the judgment below.

1. *No. 90-1604.* Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), expressly preempts the enactment or enforcement of any state law "relating to" airline rates. As the Seventh Circuit correctly noted, "[p]rice advertising surely 'relates to' price," *Illinois Corporate Travel* v. *American Airlines*, 889 F.2d at 754. More specifically, the *NAAG Guidelines* "relate to" airline rates in a sense that implicates the congressional purpose behind Section 105, because the *NAAG Guidelines* raise competitive issues that Congress intended to be resolved on a uniform basis on the federal level. Accordingly, the court of appeals was correct in concluding that state consumer protection laws " 'relate to' rates when applied to airline fare advertising." Pet. App. 32a-33a.

a. Congress did not limit preemption to state regulation "of" airline rates. Section 105 of the Federal Aviation Act of 1958 is far broader: It expressly preempts all State laws "relating to" air carrier rates. State law "relates to" a subject "if it has a connection with or reference to" it, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw* v. *Delta Airlines, Inc.*,

463 U.S. 85, 96-97 (1983) (interpreting that phrase in ERISA), and here there is a direct, immediate, and strong relationship between advertising and price. This Court has recognized that advertising restrictions "serve[] to increase the [consumers'] difficulty of discovering the lowest cost seller of acceptable ability," which leaves sellers "isolated from competition" and reduces "the incentive to price competitively," *Bates* v. *State Bar*, 433 U.S. 350, 377 (1977). Studies in other fields have confirmed that consumers pay higher prices when advertising is restricted. See Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972); Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 Econ. Inquiry 493 (1976). The statutory language therefore does not support petitioners' claim that federal preemption extends only to State laws that fix airline rates. See 90-1604 Pet. 9; 90-1606 Pet. 16.

b. The legislative history also does not support petitioners' theory. Prior to 1978, the Civil Aeronautics Board (CAB) had consumer protection authority over airlines under Section 411 of the Federal Aviation Act of 1958, 49 U.S.C. App. 1381, but shared that authority with the States, because there was no federal preemption provision. See *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). Section 105 was adopted in 1978 as part of the Airline Deregulation Act, with the purpose of avoiding "a confusing system of dual regulation" and granting "sole responsibility" for regulating interstate carriers to the CAB. S. Rep. No. 631, 95th Cong., 2d Sess. 98 (1978); see H.R. Rep. 1211, 95th Cong., 2d Sess. 16 (1978). "In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

Under the pre-1978 regulatory regime, price-based advertising was of little importance because the CAB did not allow air carriers freely to adjust their fares and price competition was absent. Under deregulation, price became a principal means of competing, and price advertising multiplied immensely. At the same time, a complex fare structure emerged, owing to several factors: A large part of air carriers' costs is joint and common, and is not directly attributable to any one service or class or passenger; the marginal cost of providing additional service is often low; most carriers operate with substantial excess capacity overall, but face heavy demand for some flights; and air travel is highly seasonal and cyclical. Some persons (typically business travelers) have a demand for air travel that is relatively inelastic, but they need to be able to travel at particular times, on short notice, and in the shortest span of time. Others (frequently tourists) are sensitive to changes in the price of air travel, but have less stringent demands in terms of schedules and notice. Airlines seek to recover their joint and common costs by charging higher fares to persons with an inelastic demand for air travel and by filling otherwise empty seats with other customers who are charged lower fares (that still exceed marginal cost).

To preserve this complex system, airlines impose restrictions on lower-priced tickets, making them a less valuable commodity that would not be attractive or even available to customers desiring to fly on short notice with an unrestricted schedule. The convergence of increasing price competition and increasing fare complexity raises difficult issues from the standpoint of regulating price advertising under the consumer protection provision of the Federal Aviation Act of 1958. As price advertising becomes an increasingly important element in the marketplace for air travel, it becomes increasingly difficult to convey in any advertisement the full complexity of the fare structure and ticket restrictions, while keeping the advertisement sufficiently short and clear so that it can serve as an affordable and effective price competition tool.

The DOT must exercise its consumer protection authority "in the interest of the public," 49 U.S.C. App. 1381(a), which the Airline Deregulation Act of 1978 defined to include "maximum reliance on competitive market forces," 49 U.S.C. App. 1302(a)(4). This duty obliges the DOT to take competitive considerations into account in its proceedings involving airline fare advertisements, a responsibility that state attorneys general may not share.

In this regard, the DOT has proposed to codify its enforcement policy, which differs from the *NAAG Guidelines* in at least two significant respects. Specifically, the DOT's proposed rule would permit airlines (1) to advertise fares net of certain government-imposed or government-approved charges, provided the charges are "clearly and conspicuously" stated elsewhere in the advertisement, and (2) to advertise one-way fares available only as part of a roundtrip purchase, provided the roundtrip condition is clearly stated in the advertisement. 54 Fed. Reg. 31,052 (1989). In the notice of proposed rulemaking, the DOT tentatively concluded that requiring each airline to list a single fare that included all charges would "tend to limit airline price competition" by making certain types of advertisements "difficult or impossible." *Id.* at 31,053. "The specific charges that would be permitted to be listed separately either are limited, or apply only in certain markets or for certain flights, thus making it difficult or impossible to publi[s]h advertisements with one way and round-trip fares to multiple destinations and include charges in single advertised rates." *Ibid.*[4]

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[4] An example may illustrate this point. Soon, U.S. airports will begin imposing passenger facility charges (PFCs) of up to $3 per passenger per airport, up to a total of $12 per trip per passenger, to be collected by air carriers. 56 Fed. Reg. 24,254 (1991). Thus, the total price of a ticket may vary by up to $12 depending on the embarkation, disembarkation, and connecting airports to be used by a traveller. If the additional charges had to be included in

Of course, preservation of competition does not mean that advertisements spreading false or deceptive information should be allowed. Deceptive advertisements not only injure consumers and impair competition, they also violate federal law. The DOT has the authority to proceed against air carriers for "unfair or deceptive practices," 49 U.S.C. App. 1381, and has exercised that authority on numerous occasions. In proceedings concerning deceptive airline advertisements, however, care must be taken not to impose, in the name of "full disclosure," requirements that discourage price competition. The DOT's ability to regulate airline advertising in a competition-sensitive manner, however, would be undermined if airline fare advertising must also comply with the perhaps quite different regulatory policies of various state attorneys general. The purpose of Section 105 was to preserve the DOT's ability to implement the federal policy in favor of price competition by preempting the enactment or enforcement of state laws "relating to" airline rates; that purpose is fully implicated when the States attempt to regulate airline fare advertisements.

c. There is no conflict among the circuits on the preemption question presented in the petition. In fact, this case is the only federal appellate decision addressing whether federal law preempts state regulations of airline fare advertising.[5]

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the total advertised air fare, as the *NAAG Guidelines* require, as many as 13 fares might have to be listed in an air fare advertisement for just one city-pair market (*e.g.*, Washington to Los Angeles), since the total price might vary according to whether connecting flights are used involving airports charging the PFC and what those airports are.

[5] In *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, *supra*, the Seventh Circuit concluded that Section 105 preempts state law requiring an air carrier to deal with a travel agent refusing to respect a contract restricting advertising of discount rates. The court did not decide, however, whether all state law

Nor does the decision below conflict with *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). In *Nader*, this Court held that the CAB's authority under Section 411 of the Federal Aviation Act of 1958, 49 U.S.C. App. 1381, to issue cease-and-desist orders against deceptive practices did not empower the Board to immunize airlines from state law tort suits for misrepresentation in connection with overbooking. *Nader* was decided before the Airline Deregulation Act of 1978, including Section 105(a)(1), was enacted, so this Court had no opportunity in *Nader* to consider the effect of that law.

The decision below does not conflict with the Ninth Circuit decisions cited by petitioners. *West* v. *Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), petition for cert. pending, No. 91-505, concluded that Section 105(a)(1) does not preempt an airline passenger's suit against an airline under state contract law for overbooking. That issue is different from the one presented here.[6] To be sure, the Ninth Circuit stated a broad rationale in that case—*viz.*, that Section 105 "preempts claims only when the underlying statute or regulation itself relates to airline services," 923 F.2d at 660—and that rationale could be read to deny preemption in this case. At the same time, a subsequent recent Ninth Circuit decision is inconsistent with such a broad reading of *West*, because it held that Section 105(a)(1) preempts state regulation

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regulation of deceptive advertising is preempted. 889 F.2d at 755. In addition, only one intermediate state appellate court has addressed this question. *People* v. *Western Airlines, Inc.*, 155 Cal. App. 3d 597, 202 Cal. Rptr. 237, cert. denied, 469 U.S. 1132 (1984). That case held that Section 105 does not preempt a state civil enforcement action against allegedly misleading statements implying fare savings in airline advertising. The disagreement between the Fifth Circuit's decision in this case and one state intermediate appellate court decision, however, does not warrant resolution by this Court.

[6] The DOT's overbooking rules recognize that passengers have an action under state contract law against an airline if passengers are adversely affected by the airline's overbooking. See 14 C.F.R. Pt. 250.

of trucking rates and service when applied to the trucking operations of an aircargo carrier, on the ground that the state regulations "bear on" or "affect" the price. *Federal Express Corp.* v. *California Public Utilities Comm'n*, 936 F.2d 1075 (1991), petition for cert. pending, No. 91-502.[7] Accordingly, it is unclear what position the Ninth Circuit would take in a case involving airline fare advertising.[8]

2. *No. 90-1606.* The court of appeals clearly erred in ruling that the 33 States waived their objection to personal jurisdiction by filing a motion in district court opposing entry of a TRO. The States' decision to oppose the TRO was reasonable and prudent given the artful phrasing of respondents' complaint. In any event, there is no legal basis for ruling that the 33 States' Motion waived

[7] The Ninth Circuit has also ruled that Section 105(a)(1) does not preempt a state regulation barring third parties from monitoring telephone conversations, as applied to airline officials seeking to monitor customer calls to ticket agents. *Air Transport Ass'n* v. *Public Utilities Comm'n*, 833 F.2d 200 (1987), cert. denied, 487 U.S. 1236 (1988). The question presented in that case, however, differs considerably from this one. What is more, the Ninth Circuit made clear in that case that "[t]his is not, however, an appropriate case for the definitive resolution of the scope of federal preemption under the Deregulation Act," because Section 105(a)(1) does not create a private right of action. 833 F.2d at 207.

[8] The decision below also does not conflict with *Alaska* v. *DOT*, 868 F.2d 441 (D.C. Cir. 1989). The question there was whether Alaska had standing to challenge on procedural grounds unpublished DOT orders interpreting Section 411 of the Federal Aviation Act of 1958 as permitting the separate statement of certain charges in advertised fares. The DOT argued that the State lacked standing because another DOT order, not challenged in that lawsuit, also permitted that advertising practice and thus pre-empted the law that Alaska sought to protect. The court of appeals disagreed with the DOT's interpretation of its prior order and found that Alaska had standing because the challenged orders "provide the only possible basis for preemption." 868 F.2d at 444. *Alaska*, however, did not consider whether Section 105(a)(1) supplied an alternative basis for preemption, and thus did not consider the question in this case.

their objection to the personal jurisdiction of the district court.

a. There is a threshold jurisdictional issue: 28 of the 33 States contend that there is no case or controversy between respondents and them. In its opinion upholding the permanent injunction, the Fifth Circuit declined to address this question on the ground that that court had implicitly rejected the States' claim in the course of upholding the preliminary injunction. Pet. App. 6a. To our knowledge, however, nothing in the record shows that 25 of the 33 States have brought or expressly threatened to bring enforcement actions against respondents for their air fare advertising.[9] In addition, it is an open ques-

[9] Petitioners in No. 90-1606 claim (Pet. 23) that no case or controversy exists concerning 28 of the 34 States subject to the district court's permanent injunction. That claim rests on the premise that only six States (California, Kansas, Massachusetts, New York, Texas, and Washington) "have threatened or initiated any legal action under any of their respective consumer protection statutes against any of the airline plaintiffs." *Ibid.* The record, however, contains a February 3, 1988, memorandum addressed to "Airlines and other interested parties" and signed by, among others, the attorneys general of three additional States, Colorado, Missouri, and Wisconsin, which threatens an enforcement action against any airline violating § 2.5 of the *NAAG Guidelines* (relating to inclusion of additional charges in air fares). That brings to 9 the number of States that have threatened enforcement, leaving 25 States that have not threatened to bring an enforcement action, but that are subject to the district court's permanent injunction. Of those 25 States, two, Arkansas and Maine, have not joined in the petitions for certiorari in Nos. 90-1604 and 90-1606.

In their Brief in Opposition, respondents do not identify any action taken or threatened by these 25 States that satisfies the requirements of Article III. Instead, respondents rely on "the non-Texas petitioners' precipitate entry into the case" and "their demand that they be left free to 'enforce[] . . . their state law in their state court,'" Br. in Opp. 14, quoting Pet. App. 39a. As explained below, however, the States did not act precipitously by filing their Motion. Moreover, respondents' excerpt from the opinion below is misleading. The full sentence, which is taken from the argument of the Kansas Attorney General at the TRO hearing, appears as fol-

tion whether a State's participation in the NAAG's decision to adopt the *NAAG Guidelines* without more constitutes the "credible threat of prosecution" necessary to establish a case or controversy in a pre-enforcement action seeking to enjoin a State from enforcing one of its laws, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Compare *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954); *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237 (1952). Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980).

There is no need, however, for the Court to resolve that issue at this time. The Article III question affects only 25 of the 33 States that filed the petition in No. 90-1606, because there is a case or controversy between respondents and eight of the 33 States. It therefore is unnecessary to resolve the jurisdictional question in order to dispose of the remaining questions in No. 90-1606. See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 402-403 n.22 (1982); *Babbitt*, 442 U.S. at 299 n.11. In addition, the Fifth Circuit clearly erred in ruling that the 33 States had waived their objection to personal jurisdiction, and the judgment below should be summarily reversed on that point. Since this Court has jurisdiction to reverse the judgment below on that point and since doing so will dispose of that judgment with respect to all 33 States, there is no present need to resolve the subject matter jurisdiction question presented in No. 90-1606.

b. Rule 12(h)(1) of the Federal Rules of Civil Procedure directly addresses the issue whether the claim of lack of personal jurisdiction can be waived. It provides that a defendant waives the defense of lack of personal

lows in the court of appeals' opinion: "The bottom line . . . is that individual states should not be precluded in advance *as they consider* enforcement of their state law in their state court." Pet. App. 39a (emphasis added).

jurisdiction if he files certain motions before filing his answer and fails to include that defense in the motion.[10] That Rule applies only to the parties to a lawsuit, however, and the 33 States were not parties to this action when they filed their Motion. Pet. App. 42a. Accordingly, the States did not waive their personal jurisdiction defense by operation of Fed. R. Civ. P. 12(h)(1). Moreover, the States expressly reserved their personal jurisdiction objection; they argued that they should not be enjoined because they had not been named in or served with the complaint; and they maintained that each State independently enforces its own laws. Those arguments were sufficient to preserve the 33 States' objection to personal jurisdiction. Cf. *Wyrough & Loser, Inc.* v. *Pelmor Lab., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967) (rejecting claim that opposing a preliminary injunction request by a party that does not raise a personal jurisdiction objection per se waives that defense; finding waiver only because the defendant opposed request without noting in any way a personal jurisdiction objection and without asking for a continuance of the hearing to consider this issue).

The court of appeals acknowledged that the 33 States were not parties to this action, but considered that fact irrelevant because the States should be deemed "de facto intervenors." Pet. App. 42a. Here as in many other areas of the law, the Latin phrase "de facto" is perhaps best translated as "not really." The so-called "de facto intervention" doctrine represents a willingness by some courts to overlook nonprejudicial defects in the interven-

[10] *Chilicky* v. *Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1986), rev'd on other grounds, 487 U.S. 412 (1988); *Myers* v. *American Dental Ass'n*, 695 F.2d 716, 720-721 (3d Cir. 1982), cert. denied, 462 U.S. 1106 (1983); *Rauch* v. *Day & Night Mfg. Corp.*, 576 F.2d 697, 701-702 (6th Cir. 1978) (collecting cases); *Union Camp Corp.* v. *Dyal*, 460 F.2d 678, 684 (5th Cir. 1972); *Guardian Title Co.* v. *Sulmeyer*, 417 F.2d 1290, 1291-1292 (9th Cir. 1969); *Varone* v. *Varone*, 392 F.2d 855, 857 (7th Cir. 1968). See also, *e.g.*, *Pardazi* v. *Cullman Medical Center*, 896 F.2d 1313, 1317-1318 (11th Cir. 1990).

tion requirements of Fed. R. Civ. P. 24(c). See 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1914, at 413-416 (1986).[11] That doctrine does not apply here, because the 33 States' Motion made clear that they had not yet decided whether or how to participate in this lawsuit—*i.e.*, "whether to seek leave from this Court to file an Amicus Curiae Brief or to seek leave to intervene," App. D, *infra*, 68a—and needed more than two days' notice to make that determination. The court of appeals simply misread the States' Motion.[12]

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[11] See, *e.g.*, *Gatz* v. *Southwest Bank of Omaha*, 836 F.2d 1089, 1093 (8th Cir. 1988); *International Marine Towing, Inc.* v. *Southern Leasing Partners, Ltd.*, 722 F.2d 126, 129 (5th Cir. 1983); *Spring Constr. Co.* v. *Harris*, 614 F.2d 374, 376-377 (4th Cir. 1980); *United States* v. *RMI Co.*, 599 F.2d 1183, 1186-1187 (3d Cir. 1979); *Martindell* v. *IT&T*, 594 F.2d 291, 294 (2d Cir. 1979); *Roach* v. *Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972); *Smartt* v. *Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), cert. denied, 380 U.S. 934 (1965). Contra *Spangler* v. *Pasadena City Bd. of Educ.*, 552 F.2d 1326 (9th Cir. 1977) (Kennedy, J.) (ruling that district court erred by changing desegregation plan on motion of parents whose children were affected by the plan but who did not become parties under Fed. R. Civ. P. 24).

[12] The so-called "de facto intervenor" doctrine has principally been used as a basis for allowing persons who were technically non-parties, but who participated in the trial court litigation and who are affected by a trial court order, to take an appeal from that order despite the rule, see, *e.g.*, *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), that only the parties to a case may do so. See, *e.g.*, *Roach* v. *Churchman*, 457 F.2d at 1104. That application of this doctrine has no relevance here. In deeming the 33 States to be "de facto intervenors," the court of appeals did not excuse a nonprejudicial defect in the Rule 24(c) process. On the contrary, the court required the States to satisfy the strict pleading requirements that Fed. R. Civ. P. 12 imposes on a person named in the complaint as a defendant, even though the States had no notice that the Rule 12 requirements applied to them. In so doing, the court transformed a principle designed to excuse "a procedural blunder of no real significance," 7C C. Wright, A. Miller & M. Kane, *supra* § 1914, at 415, into a trap for any unwary third party who is at risk of being enjoined under Rule 65(d), but who is not given an opportunity even to protest the entry of a TRO on the ground that the court

The Fifth Circuit also relied on the rule that an intervenor may not object to the personal jurisdiction of a court while simultaneously asking for "affirmative relief." Pet. App. 42a. The rationale for that rule is that "a party who invoked the power of the court for his own purposes should not be allowed the inconsistent objection that the forum was personally inconvenient for him." 5 C. Wright & A. Miller, *supra*, § 1397, at 787-788.[13] But that principle also does not apply here, because the States' simply opposed the affirmative relief sought by *respondents*.

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lacks personal jurisdiction over that party. We are aware of no precedent and no rationale justifying that result.

Respondents have cited only one decision, *In re Grand Jury Proceedings*, 654 F.2d 268 (3d Cir. 1981), in which a court relied on this doctrine to penalize a non-party, and that case is no precedent for this one. There, the defendant in a state criminal prosecution filed a motion seeking the disclosure of exculpatory material held by a federal grand jury. The district court ordered the U.S. Attorney to assemble the relevant materials and to consult with the state trial judge. The state trial judge sought to appeal the order, but his appeal was dismissed on the ground that he was not a party. *In re Grand Jury Proceedings*, 625 F.2d 1106 (3d Cir. 1980). When the defendant sought to enforce the order, the state trial judge filed a reply opposing the defense effort. By filing such a reply, the court of appeals held, the state judge waived his claim that the district court lacked personal jurisdiction. 654 F.2d at 271. Even if that decision is correct, it bears little resemblance to this case: In this case, there was no prior court of appeals' decision holding that the 33 States were not parties to this lawsuit.

[13] See also, *e.g.*, *Grammenos* v. *Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972) (collecting cases). Justice Holmes penned the classic formulation of this principle: "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it." *Merchants Heat & Light* v. *J.B. & Sons*, 204 U.S. 286, 289 (1907) (citations omitted). See *City of Santa Clara* v. *Kleppe*, 428 F. Supp. 315 (N.D. Cal. 1976) (intervenor waives objection to personal jurisdiction by asserting claim to payment from escrow fund).

Regardless of whether the States' decision to file the Motion and appear at the TRO hearing is viewed in hindsight as a reasonable litigation step,[14] the Motion does

[14] The Fifth Circuit believed that the 33 States had no reason to fear they would be enjoined under the TRO. Pet. App. 42a. The complaint proves the court wrong.

The complaint alleged that the named defendant, the Texas attorney general, acted "in concert with numerous other states' attorneys general" in issuing the *NAAG Guidelines*, Compl. para. 6; App. C, *infra*, 44a, and that "[respondents] have been threatened with an enforcement action by the Attorney General of Texas and by other states' attorneys general acting in concert with him," *id.* para. 46, at 59a. The complaint further alleged that the "concerted activities" of the various States in connection with the *NAAG Guidelines* were "an illegal agreement or compact among the states." *Id.* para. 49, at 60a. In that connection, the complaint asserted that respondents "are entitled both to a declaration that the Guidelines are void and unenforceable, *and an injunction preventing any attempt by the Attorney General of Texas, or any NAAG member in active concert or participation with him, from enforcing the Guidelines through their state laws.*" *Id.* para. 50, at 60a. (emphasis added). Given those allegations, respondents' prayer for relief could readily have troubled States that had participated in the adoption of the *NAAG Guidelines*. The prayer sought declaratory relief and an order enjoining the Texas attorney general "*and all other persons acting for or in active concert with* [*him*], from taking any action against plaintiffs pursuant to Texas Bus. & Comm. Code §§ 17.41 *et seq. or any other state law* in conjunction with the NAAG Guidelines" regarding airline rates, routes or services. App. C, *infra*, 63a-64a (emphasis added). Moreover, respondents' request for a TRO and the memorandum respondents filed along with their TRO request sought to have the States enjoined under Fed. R. Civ. P. 65(d), because the States were "in active concert or participation with" the Texas attorney general. Plaintiffs' Motion for a Temporary Restraining Order 1-2, 3-4 (Jan. 23, 1989); Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order 2 n.2 (Jan. 23, 1989). (Indeed, after the district court clarified that the preliminary injunction applied only to Texas, respondents again sought to have the other 33 States enjoined under Fed. R. Civ. P. 65(d) on the ground that they were acting "in concert" with Texas. Plaintiffs' Memorandum in Support Of Motion to Broaden Injunction [etc.] 21-25 (Mar. 18, 1989).) Respondents thus clearly believed that the 33 States were acting "in concert" with Texas and sought to have the States enjoined for that reason. Since the allegations of concerted activity clearly involved States that were members of the NAAG, the Motion filed by the 33 States and their appearance at the hearing on the TRO were prudent steps to take to try to avoid being enjoined before respondents sought to make them parties.

not support the court of appeals' conclusion that the 33 States waived their objection to personal jurisdiction. Not only does the Motion state that it is submitted "without admitting that this Court has personal jurisdiction [over the 33 States]," it goes on to state that the TRO should be denied because the TRO "could affect the sovereign rights of states which have neither been served nor named as defendants." App. D, *infra*, 65a, 66a. The States did not become "plaintiffs" by opposing the TRO; at most, they raised a defense. Treating their opposition to the TRO request as a demand for "affirmative" relief deprives that term of meaning. In any event, Rule 12(b), Fed. R. Civ. P., states that "[n]o defense or objection is waived by being joined with one or more other defenses in a responsive pleading or motion." Thus, even if the 33 States' Motion could be said to have addressed both the merits of respondents' claims and personal jurisdiction, Rule 12(b) specifically authorizes that procedure.[15]

[15] Some courts have held that the adoption of Rule 12 modified the "affirmative relief" doctrine, so that a party defendant not only may assert any defense without waiving an objection to personal jurisdiction, but also may assert a compulsory counterclaim. See *Neifeld* v. *Steinberg*, 438 F.2d 423, 430 n.13 (3d Cir. 1971) (collecting cases); 5 C. Wright & A. Miller, *supra*, § 1397, at 791-792 (endorsing this practice). Indeed, the Fifth Circuit, among other courts, previously had ruled that a defendant may also assert a *permissive* counterclaim without waiving his objection to personal jurisdiction. *Bayou Steel Corp.* v. *M/V Amsteldvoorn*, 809 F.2d 1147, 1149 (5th Cir. 1987) (collecting cases); *Gates Learjet Corp.* v. *Jensen*, 743 F.2d 1325, 1330 n.1 (9th Cir. 1984) ("If we were to find a waiver when a defendant files a permissive counterclaim in the same pleading in which he asserts jurisdictional defenses, the purposes behind Rule 12(b)—to avoid the delay caused by successive motions and pleadings and to reverse the prior practice of asserting jurisdictional defenses by 'special appearances'—would be thwarted."), cert. denied, 471 U.S. 1066 (1985). (Earlier cases

The court of appeals readily acknowledged that "[a] party may appear generally and yet object to personal jurisdiction at any time before the answer is filed or in the answer." Pet. App. 42a. Nevertheless, the court held that the States could not take advantage of that rule because they were not parties to this case when they opposed the TRO. *Ibid.* But there is no basis for applying the Rule 12(h)(1) forfeiture rule more strictly to an intervenor than to a party named in the complaint. 7C C. Wright, A. Miller, & M. Kane, *supra*, § 1920, at 488 & n.7 ("Unless conditions have been imposed, the intervenor is treated as if he were an original party and has equal standing with the original parties."). Thus if, as the court of appeals determined, the 33 States became "*de facto* intervenors" by filing the Motion opposing the TRO, then they were entitled to the same treatment as parties, who under Rule 12 may combine defenses to the merits and objections to jurisdiction in one pleading. If, on the other hand, the States did not become parties by filing the Motion, then they cannot be subjected to the district court's injunction. In either case, there is no basis for the Fifth Circuit's ruling that the 33 States waived their objection to personal jurisdiction simply by filing the Motion. The judgment below is therefore in error on this point.

c. We recognize that the ruling below turns on the facts of this case and that the factual situation in this case is unusual, which ordinarily would mean that the Fifth Circuit's error would not warrant correction by this Court. On the other hand, the consequences of that error are severe: The court of appeals has allowed a single federal district court judge to enjoin 33 States from

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finding a waiver in the case of permissive but not compulsory counterclaims are collected in *Neifeld*, 438 F.2d at 430 n.13.) If a defendant may assert a compulsory or permissive counterclaim without waiving his objection to personal jurisdiction, it follows that the purely defensive presentation made by the 33 States here cannot constitute a waiver.

enforcing their laws without first having considered the States' objection to the district court's personal jurisdiction, simply because those States sought to avoid having a TRO entered against them in an action where they were not named in or served with the complaint. The upshot is that 33 States have been denied the opportunity to litigate the merits of the preemption issue in their respective circuits or state courts in the context of their own laws, and this Court has been denied the perspective that such litigation could afford. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). Correcting the court of appeals' error will undo these injuries and will allow this Court to obtain the benefit of the views of the other courts on the preemption issue before this Court considers whether it needs to resolve that question.[16]

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[16] If the Court were instead to decide to give plenary review to the judgment below, the Court should grant the petition in No. 90-1604 (the Texas petition) and hold the petition in No. 90-1606 (the 33 States' petition). The petition in No. 90-1604 presents the preemption question that is also presented in No. 90-1606, but the petition in No. 90-1604 does not present the jurisdiction and waiver that are raised by the 33 States' petition. A decision by this Court on the preemption issue could render moot the other issues presented in No. 90-1606.

CONCLUSION

The petition for a writ of certiorari in No. 90-1604 should be denied. The petition for a writ of certiorari in No. 90-1606 should be granted limited to Question 2, and the judgment below should be summarily reversed. In all other respects the petition in No. 90-1606 should be denied.

Respectfully submitted.

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OCTOBER 1991

* The Solicitor General is disqualified in these cases.

APPENDIX A

STATUTORY PROVISIONS AND RULE INVOLVED

1. Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), provides as follows:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

2. Rule 12 of the Federal Rules of Civil Procedure provides in part as follows:

> Defenses and Objections—When and How Presented—By Pleading or Motion for Judgment on the Pleadings
>
> (a) When Presented. A defendant shall serve an answer within 30 days after the service of the summons and compiaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto

within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 20 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A

motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to

a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

APPENDIX B

Submitted by: Consumer Protection Committee

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted
Winter Meeting 1987

Modified
Spring Meeting

March 13-15, 1988
Washington, D.C.

III

RESOLUTION

ADOPTING THE AIR TRAVEL INDUSTRY ENFORCEMENT GUIDELINES

WHEREAS, the Attorneys General, as the chief law officers of their states, are the primary enforcers of the states' consumer protection laws; and

WHEREAS, pursuant to their authority under state and common law, the state Attorneys General have jurisdiction to enforce the consumer protection laws as to unfair or deceptive practices by members of the air travel industry, and have done so; and

WHEREAS, all advertisements by airlines, including fare advertisements, are subject to the same standards as any other provider of goods or services and must be nondeceptive and in plain language; and

WHEREAS, in response to an increase in consumer complaints involving the air travel industry,

the National Association of Attorneys General, in June 1987, directed the Consumer Protection Committee to designate a task force of states to study the air travel industry and determine the extent and nature of practices that were allegedly unfair or deceptive and further directed the task force to present its findings along with any recommended course of action to the Attorneys General at the NAAG 1987 winter meeting; and

WHEREAS, the task force undertook an in-depth inquiry into prevalent practices in the air travel industry to determine the nature of such practices and to determine whether they constituted unfair or deceptive practices; and

WHEREAS, the inquiry by the task force resulted in the determination that a number of practices prevalent in the air travel industry were potentially unfair or deceptive; and

WHEREAS, a number of states are presently investigating misleading advertising in the air travel industry and have therefore withheld the filing of actions until guidelines have been adopted; and

WHEREAS, the task force has recommended that the best means of correcting such practices that constitute unfair or deceptive practices in the air travel industry is through the adherence by the air travel industry to uniform guidelines dealing with fare advertising, frequent flier programs and the disclosure of policies on compensation for voluntary denied boarding; ———

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1) Adopt the Air Travel Industry Enforcement Guidelines as a statement of the general enforcement policy of the Attorneys General with respect to unfair or deceptive acts or practices in the airline industry, subject to the exercise of their individual prosecutorial discretion, and variations or supplementations to allow for variations in precedents among the federal circuits and differences in individual state or common law, and determines that in order to have an orderly process of implementation the guidelines take effect January 15, 1988, except and provided that this does not require that airlines make any required changes in frequent flyer program brochures prior to April 15, 1988; and

2) The task force on the air travel industry is instructed to receive and examine any comments from the industry, consumer groups, federal agencies, and other interested parties, evaluate any such comments, and report to NAAG at its spring 1988 meeting on the advisability of any modifications of the guidelines; and

3) That the Executive Director and General Counsel is authorized to make the Air Travel Enforcement Guidelines available to appropriate members of the Administration, Congress, and other interested individuals and associations.

The following Attorneys General dissent:

David Wilkinson, Utah; Hal Stratton, New Mexico

Action: March 15, 1988

1. The Staff Comments of March 8, 1988, developed in accordance with Section 2 of this Resolution, are adopted and are to be incorporated into the Guidelines and Commentary.

2. Chair of the Consumer Protection Committee, Attorney General William L. Webster, is authorized to appoint a task force of four Attorneys General to continue to evaluate the effectiveness of the Guidelines and to continue discussions with members of the industry and other interested parties.

Abstensions:

Attorney General David L. Wilkinson, Utah

NATIONAL ASSOCIATION OF
ATTORNEY GENERAL

TASK FORCE
ON THE
AIR TRAVEL INDUSTRY

GUIDELINES
AND
COMMENTARY

APRIL 1988

National Association of Attorneys General
Task Force on the Air Travel Industry
Revised Guidelines

INTRODUCTION

In June, 1987, the National Association of Attorneys General ("NAAG") directed the appointment of a Task Force of states to study the advertising and marketing practices of the airline industry in the United States. In addition to the study, the Task Force was directed to determine the nature and extent of existing unfair and deceptive airline advertising practices and to report a recommended course of action to NAAG at its meeting in December 1987.

The Task Force Report and Recommendations were adopted by NAAG at its winter meeting on December 12, 1987, with a continuing direction to the Task Force (1) to receive and examine any comments from industry, consumer groups, federal agencies, and other interested parties; (2) to evaluate these comments; and (3) to report to NAAG at its Spring 1988 meeting on the advisability of any modifications of the Guidelines.

The Task Force received written comments from the Air Transport Association, the American Association of Advertising Agencies, American Airlines, the Association of National Advertisers, the Council of Better Business Bureaus, the Federal Trade Commission, the National Association of Broadcasters, Southwest Airlines, United Airlines, USAir, and the U.S. Department of Transportation. Assistant attorneys general of the Task Force states evaluated these comments, and reported their recommendations to NAAG.

On March 15, 1988, NAAG adopted the recommended changes to the frequent flyer Guidelines and directed that the comments to both the fare advertising and frequent flyer Guidelines be changed to respond to valid concerns raised by those filing comments. The Guidelines and comments herein reflect the changes directed by NAAG.

NAAG also directed the chair of NAAG's Consumer Protection Committee to appoint four attorneys general to serve on a continuing task force to evaluate the effectiveness of the Guidelines and to continue discussions with members of the industry and other interested parties. These attorneys general are: John Van de Kamp (California), Neil F. Hartigan (Illinois), Jim Mattox (Texas), and Kenneth O. Eikenberry (Washington).

It is important to note that these Guidelines do not create any new laws or regulations regarding the advertising practices or other business practices of the airline industry. They merely explain in detail how existing state laws apply to air fare advertising and frequent flyer programs. Each Guideline is followed by a comment which summarizes:

- NAAG's intent with respect to that Guideline.
- Any relevant comments received by the Task Force.
- Any significant changes that were made to the Guidelines.

Section 1—Definitions

1.0 Advertisement means any oral, written, graphic or pictorial statement made in the course of solicitation of business. Advertisement includes, without limitation, any statement or representation made

in a newspaper, magazine or other public publication, or contained in any notice, sign, billboard, poster, display, circular, pamphlet, or letter (collectively called "print advertisements"), or on radio or television ("broadcast commercials").

Comment: This definition encompasses those materials and media covered by most states' false advertising statutes. "Print advertisements" and "broadcast commercial" are separated into different categories because they are afforded slightly different treatment under these Guidelines. This represents a change from an earlier draft of the Guidelines and is an attempt to address some of the airlines' concerns regarding the difficulties of lengthy disclosures in broadcast commercials.

1.1 Award means any coupon, certificate, voucher, benefit or tangible thing which is promised, given, sold or otherwise transferred by an airline or program partner to a program member in exchange for mileage, credits, bonuses, segments or other units of value credited to a consumer as an incentive to fly on any airline or to do business with any program partner.

Comment: This definition, as well as definitions 1.2, 1.3, 1.4, 1.6, 1.9, and 1.10, is self-explanatory.

1.2 Award level means a specified amount of mileage or number of credits, bonuses, segments or other units which a program member must accumulate in order to receive an award.

1.3 Blackout date means any date on which travel or use of other program benefits is not permitted for program members seeking to redeem their award levels. This is a form of capacity control.

1.4 Capacity control means the practice by which an airline or program partner restricts or otherwise limits the opportunity of program members to redeem their award levels for travel or other benefits offered in the program.

1.5 Clear and conspicuous means that the statement, representation or term ("statement") being disclosed is of such size, color contrast, and audibility and is so presented as to be readily noticed and understood by the person to whom it is being disclosed. All language and terms should be used in accordance with their common or ordinary usage and meaning. For example, "companion" should be used only when it means any companion (*i.e.*, any person traveling with the program member), not solely family members. Without limiting the requirements of the preceding sentences:

(a) A statement in a print advertisement is considered clear and conspicuous if a type size is used which is at least one-third the size of the largest type size used in the advertising. However, it need not be larger than:

- 10-point type in advertisements that are 200 square inches or smaller, and
- 12-point type in advertisements that are larger than 200 square inches.

If the statement is in the body copy of the advertisement, it may be in the same size type as the largest type used in the body copy, and does not have to meet these type-size requirements.

(b) A statement in a broadcast commercial is considered clear and conspicuous if it is

made orally and is as clear and understandable in pace and volume as the fare information.

(c) A statement on any billboard is considered clear and conspicuous if a type is used which is at least one-third the size of the largest one size used on the billboard.

(d) A statement required by Section 3, relating to frequent flyer programs, is considered clear and conspicuous if it is prominently located directly adjacent to the materials to which it applies. Type size should be no smaller than the most commonly-used print size in the document, but in no event smaller than 10-point type. Any reservation of any right to make future changes in the program or award levels should be located prominently at the beginning of printed materials.

Comment: One of the most deceptive aspects of current air fare advertisements is the completely inadequate manner in which those advertisements disclose the restrictions and limitations which apply to the advertised fares. The restrictions disclosed in print advertisements are rarely located near the fare advertised and often appear only in extremely small type at the bottom of the advertisement. In broadcast commercials, such disclosures are generally absent from radio advertisements, and if included at all in television commercials appear as written disclosures flashed on the screen much too quickly for the average person to read. On billboards any mention of restrictions on advertised fares is unusual.

Given this background, NAAG believes that it is necessary to define clearly for the airlines what con-

stitutes clear and adequate disclosure in all advertising media. The type-size minima for print advertisements are aimed at making the disclosures both easy to read and noticeable. Consequently, a slightly larger size print is suggested in larger size advertisements. These type-size minima are not absolute. That is, print disclosures do not in every instance have to be in at least 10-point type, as long as they are clear and conspicuous regardless of the size of the type. The type size suggestions are merely examples of advertising practices which give an airline a reasonable expectation that it will not be sued if it follows the Guidelines. In the Task Force's meetings with the airlines last summer, one common note expressed was that the airlines could abide by disclosure guidelines, as long as they were clear and enforced uniformly. If an airline does not choose this safe harbor and instead ventures into untested waters, it may run aground and it may not. But it is free to do so.

The comments to this Guideline were critical largely because NAAG singled out airline advertisements for this treatment. However, on the whole, the airlines indicated they could meet the type size standard relatively easily in print advertisements.

NAAG elected to encourage oral disclosures in broadcast media, because written disclosures are difficult if not impossible to read and because many people listen to, rather than watch television commercials. We continue to believe that oral disclosure is the best method of conveying information in a television commercial. However, the converse of this Guideline is not true—a disclosure in a television commercial is not necessarily deceptive if it is instead made in a video super or crawl, as long as it is still clear and conspicuous.

For safety reasons, very large type is provided for billboards.

1.6 Frequent flyer program means any program offered by an airline or program partner in which awards are offered to program members.

1.7 Limited-time availability means that the fare is only available for a specific period of time or that the fare is not available during certain blackout periods.

Comment: This definition applies to air fares that are only available certain times of the year (e.g., available December 15 through April 15), are not available at certain times at all (not available December 23 through January 5), or are only available until a date cetrain (available only until January 15). It does not apply to fares that are unavailable only on certain days of the week or times of the day.

1.8 Material restriction means a restriction, limitation, or other requirement which affects the use or refundability of a ticket, and which is not generally applicable to all classes of fares or tickets (such as standard conditions of carriage).

Comment: Due to the numerous standard conditions applicable to most airline tickets, NAAG has confined the definition of "material restrictions" to those restrictions and limitations that are specific and unique to certain fare categories (i.e., those that are different from the restrictions and limitations that apply to a standard coach ticket).

1.9 Program member means any consumer who has applied and been accepted for membership in an airline's frequent flyer program, regardless of whether he or she has accrued mileage, credits,

bonuses, segments or other units of value on an airline or with any program partner.

1.10 Program partner means any business entity which provides awards as part of an airline's frequent flyer program.

1.11 Vested member means a member of a frequent fllyer program who is enrolled in an existing program and has provided consideration to the airline or its partners, and who has not received adequate notice of program changes such as set forth in Sections 3.2 and 3.9. For example, consideration includes purchasing tickets on an airline, renting a car or using a specific credit card.

Comment: This definition separates out those consumers who joined a frequent flyer program without receiving adequate notice of how that program could change prospectively. The Guidelines afford some special protections to vested members and vested miles. There is sound reason for this.

After reviewing the travel reward promotional materials for most of the major airlines, NAAG concluded that currently vested members have not received adequate disclosure of the potential for significant increases in award levels or imposition of other restrictions which may result in the airlines' unilateral devaluation of awards. Therefore, the Guidelines treat vested members and the miles which members accrued before receiving adequate notice of prospective changes differently.

1.12 Vested mile means program mileage (or other credits) accumulated by a vested member before that person receives adequate notice of program changes, as set forth in Sections 3.2 and 3.9.

Comment: This definition identifies any mileage or credit accrued by a vested member before he or

she received adequate notice regarding the possibility of future detrimental changes in the program. See the comments to the definition of vested member.

Section 2—Fare Advertisements

2.0 General guideline

Any advertisement which provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive. Deception may result not only from a direct statement in the advertisement and from reasonable inferences therefrom, but also from omitting or obscuring a material restriction.

Comment: This Guideline and the following Guidelines restate individual states' false advertising and deceptive practices statutes as they apply to air fare and price advertising.

2.1 Disclosure in print advertisements

Print advertisements for fares must make clear and conspicuous disclosure of restrictions such as:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- Time of day or day of week restrictions.
- Length of stay requirements.
- Advance purchase requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.

- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- The statement, if any, required by Guideline 2.4.
- Any other material restriction on the fare.

This Guideline would be met by disclosing material restrictions either:

- in the body copy of the advertisement,
- adjacent to the fare price, or
- in a box with a heading such as "Restrictions."

Examples (in 10-point type) of disclosures of material restrictions if they apply to fares being advertised are:

In the body copy:

RESTRICTIONS. "Weekend traveler" fares are generally available all day Saturday and Sunday until 6 p.m. However, these fares are not available on some flights on some days.

In the box:

Restrictions These restrictions apply to one or more of these fares: • 30 day advance purchases required • Not available November 20-December 1 • New York fares only to Newark Airport

or

Restrictions. Advertised fares are only available Tuesday, Wednesday, and Thursday afternoons. Three-day advance purchases required. 50% cancellation penalty applies.

Comment: The advantage to consumers of print advertisements over television or radio advertisements is that they give consumers something tangible to use as a reference when shopping for low cost air fares. Because consumers can take their time and carefully read a print advertisement it is especially important that this type of advertisement contain the most accurate and complete information possible regarding any advertised air fares. The restrictions singled out by NAAG in this Guideline for disclosure are those NAAG believes are the most significant to a consumer contemplating purchasing a ticket. An advertisement that complies with this Guideline will give a consumer three crucial pieces of information:

1. Eligibility—consumers will know if they are eligible for the fare (i.e., can a consumer meet advance purchase requirements or other restrictions affecting time or date of travel?);

2. Availability—consumers can accurately gauge the likelihood that they will be able to obtain a ticket at the advertised price; and

3. Risk—consumers will know the risks associated with purchasing a ticket at the advertised price (i.e., is the ticket non-refundable or do other penalties apply upon cancellation or changes in itinerary?).

This particular Guideline received a great deal of negative comment because the airlines and goverment agencies misunderstood it to mean that it required full disclosure of all of the restrictions that apply to each specific flight. This is not correct. The Guideline only requires that if any of the restrictions listed in the Guideline apply to any of the air fares

advertised then the advertisement must disclose the existence of that restriction and the fact that the restriction applies to one or more of the air fares advertised. To clear up this misunderstanding, NAAG included specific examples of the disclosures required by the revised Guidelines. There was also some misunderstanding that disclosure in a box was required. As the Guideline states, this is just one option.

The comments made to the December Guidelines evidenced another misconception about the wording of the disclosures on fare restrictions. This Guideline provides suggested wording, again to assist the airlines in determining how to meet the disclosures, but the language is by no means sacrosanct. The best creative minds in the advertising business are available to the airlines through their advertising agencies. The airlines are free to avail themselves of these talents, who are certainly adept at phrasing a message the advertiser wants to get across to the consumer. The essence of the Guidelines is that consumers must be advised of the limits which the airlines has chosen to impose on consumers' ability to buy tickets at the advertised price.

2.2 Disclosure in broadcast commercials

Broadcast commercials for fares must make clear and conspicuous disclosure of:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- The statement, if any, required by Guideline 2.4.

In addition, if the following seven disclosures are not made in a clear and conspicuous manner in the commercial, any that are applicable must be disclosed orally to the passenger before reservations are actually made:

- Time of day or day of week restrictions.
- Length of stay requirements.
- Advance purchase requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.
- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- Any other material restriction in the fare.

As to these seven types of disclosure, the airline may include any or all in the commercial or may choose to defer disclosure until the time reservations are actually made.

If any of these seven disclosures applies to the fare advertised and the airline chooses to defer disclosure until the time the reservations are actually made, the commercial must give clear and conspicuous disclosure that "Other substantial restrictions apply," or similar language. The statement "Restrictions apply" is not sufficient.

Comment: In an earlier draft, the Guidelines required that radio and television advertisements include all the same disclosures required in print advertisements. The airline industry unanimously responded that such detailed disclosures would be impossible to include in the 15 and 30 second advertising spots generally purchased for radio and television ads, and argued that, even if time allowed this much oral disclosure, the resulting commercial would provide too much information for a consumer to absorb usefully. They concluded that such a requirement would eliminate airline price advertising on television and radio.

The provision of fare information, without stating the most significant restrictions that apply to the fare advertised, is deceptive and ultimately harmful to consumers and the airline industry alike.

The Guideline as revised provides a compromise. It suggests disclosure of the three most serious restrictions that can apply to an airline ticket—limited time availability, nonrefundability or exchangeability and limitations on fare availability. Disclosure of all of these restrictions can be accomplished by something as simple as the following statement: "Tickets are nonrefundable, are not available on all flights, and must be purchased by December 15. Other significant restrictions apply." These 20 words can easily be read in a 30 second commercial. In addition, some or all of this information may be clearly and conspicuously disclosed in a video super or crawl in television commercials. Of course, this option is not available for radio commercials. However, commenting airlines confirmed that the typical radio spot is 60 seconds, making the concern about time less crucial.

Airlines then have the option of disclosing any additional material restrictions in the advertisement itself or deferring such disclosure until a consumer makes a reservation. Of course, if an airline does not choose to restrict its fare severely, fewer words (and thus, less air time) is needed.

This compromise position also recognizes that print advertising lends itself more readily to detailed infor-

mation in a form which the consumer can retain and refer to at his own pace. For this reason, NAAG has chosen to require less disclosure in broadcast, allowing print to be the medium for full disclosure.

2.3 Disclosure on billboards

Any billboard which provides air fare or other price information on a fare to which any material restrictions apply must have clear and conspicuous language such as "Substantial restrictions apply." The statement "Restriction apply" is not sufficient.

Comment: For safety reasons, NAAG concluded that lengthy written disclosures on billboards are inappropriate and potentially hazardous to drivers. We disagree with the DOT that this special treatment of price advertising on billboards will result in a proliferation of billboards on our nation's highways.

2.4 Fare availability

Any advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears, beginning on the day on which the advertisement appears and continuing for at least three days after the advertisement terminates.

However, if the advertised fare is not thus available, the advertisement must contain a clear and conspicuous statement of the extent of unavailability of the advertised fare.

Statements such as "Sears limited" and "Restrictions apply" do not meet this Guideline. These examples do meet this Guideline:

- This fare may not be available when you call.
- This fare is not available on all flights.

- This fare is only available on some Saturday and Sunday flights.

Comment: This Guideline elicited the greatest amount of negative comments from the airline industry, the ATA, FTC and the DOT. They argue that this Guideline is impossible to implements because, due to the complexity of airline pricing systems, the number of seats available at a particular low fare on a particular flight is not a fixed number. It is continuously modified up to the point of departure. They suggest that it is acceptable for the airlines to communicate a general invitation to the public to buy low fare seats, but then reduce the number of seats available to zero or close to zero for the most popular flights, because the possibility that a consumer can purchase a seat at the advertised price exists at the time the advertisement is placed.

The complexity of the airlines' system cannot justify the unfairness of such an approach. No other retailer would be allowed to justify a failure to stock an advertised item on the grounds that, at the last minute the retailer decided it was less costly not to stock the item it had just advertised. The availability of an item advertised, at the price advertised, goes to the very heart of truthful advertising. If an airline advertises an air fare that is not available on each and every flight to the destination advertised, and this fact is not disclosed, then the advertisement is deceptive on its face.

While NAAG appreciates the difficulty of disclosing the specific number of seats available on each flight advertised, a disclosure that "This fare is not available on all flights" or "This fare may not be available when you call" is not particularly onerous. Absent such disclosure, airlines, as all other retailers, should

be required to have sufficient stock available to meet reasonable demand for any fare advertised.

2.5 Surcharges

Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare.

Comment: Recently, several airlines considered the possibility of passing along an increase in the cost of fuel to consumers by imposing a "fuel surcharge" rather than simply raising air fares to reflect their increased costs. The air fare advertised was to remain the same, but a footnote would be added to the advertisement in the "mice type" disclosing that, for instance, a $16 fuel surcharge would be tacked on to the advertised fare. The potential for abuse, if this type of price advertising is permitted, is obvious. It would only be a matter of time before $19 air fares from New York to California could be advertised with $300 meal, fuel, labor, and baggage surcharges added in a footnote. The total advertised price of the fare must include all such charges in order to avoid these potential abuses. However, this Guideline should not be construed to require an airline to do the impossible. We do not believe that such minimal tour-related charges fall within the meaning of "fare" and therefore do not believe that unknown charges must be disclosed as a surcharge (if the amounts is not in fact known). This of course does not mean that charges which are known —either as an exact amount or as a percentage—do not have to be disclosed in advertisements.

2.6 Round trip fare advertising

If an airline elects to advertise the one-way portion of a fare that is only available as a round-trip purchase, this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare.

Comment: Airlines routinely advertise one-half of the price (i.e., the alleged "one-way" price) for tickets that are only available if a consumer makes a round-trip purchase. Under this Guideline, if an airline elects to continue this advertising practice, it must also disclose that the fare is only available if a consumer purchases a round trip ticket and the actual price of the full round trip ticket. The disclosure must be made in a type size and location as prominent as the fare advertised.

The airlines have, for the most part, stated a willingness to advertise the full round trip air fare if all of the airlines do the same. This Guideline is intended to encourage all airlines to adopt this practice.

2.7 Deceptive use of "sale," "discount," "reduced," or similar terms

A fare may be advertised by use of the words "sale," "discount," "reduced," or other such words that suggest that the fare advertised is a temporarily reduced fare and is not a regularly-available fare only if that fare is:

- available only for a specified, limited period of time, and
- substantially below the usual price for the same fare with the same restrictions.

Comment: The majority of airline tickets sold each year sell at prices significantly lower than the full "Y" or standard regular coach fare. These lower fares are offered year round and airlines in theory

allocate a certain amount of seats to each fare "bucket." As a result, the regular coach fare has ceased to have any meaning as a starting point for determining whether or not a ticket is being offered for a "sale" price as consumers have come to understand that term.

In this Guideline NAAG has attempted to prevent consumer confusion by limiting the use of such words as "sale," "discount," or "reduced," to describe only those fares that represent a true savings over regularly available air fares—those that are available only for short periods of time and are substantially below any regularly offered fare for a ticket carrying identical restrictions.

SECTION 3—Frequent Flyer Programs

General Comments to Section 3

Frequent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history. The bargain struck between customers and the airlines has proven to be very costly to many of the airlines. Customers who have accrued the necessary mileage are expecting to collect the awards which led them to join and fly in the programs in the first place. Some airlines are now disturbed by the cost of keeping their side of the bargain and the real possibility that they may lose revenue because passengers flying on frequent flyer awards may begin displacing paying customers. The solution contemplated by some carriers has been to raise award thresholds and implement restrictions to decrease the cost to them of the award program. The effect of these actual and/or potential changes is to significantly devalue vested members' accrued mileage or other credits in the program. Although various frequent flyer program awards materials have contained some obscure mention of the possibility of future program changes, these disclosures have been wholly inadequate to inform program members of the potentially major negative changes which are contemplated by many airlines.

These Guidelines cover frequent flyer programs including any partner airlines or other providers of goods or services such as rental cars and hotel rooms. They are intended to protect those consumers who have participated in these programs in good faith, without adequate notice that the programs could change, and to advise the airlines of how they can reserve this right in the future by adequately providing this information to all members in a non-deceptive manner consistent with state law.

3.0 Capacity controls

1. If an airline or its program partners employ capacity controls, the airline must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the specific techniques used by the airline or program partner to control capacity in any solicitation which states a specific award. This includes blackout dates, limits on percentage of seats (for example, "the number of seats on any flight allocated to award recipients is limited"), maximum number of seats or rooms allocated or any other mechanism whereby the airline or program partner limits the opportunities of program members redeeming frequent flyer award levels. To meet this Guideline, all blackout dates must be specifically disclosed.

2. As to awards for vested miles, the airline or program partner must provide the award to the

vested member without capacity controls or provide the award with capacity controls within a reasonable period of time. A reasonable period would be within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the vested member requested a reservation, so that the member could not be accommodated without displacing a passenger to whom a seat has been sold, then a reasonable period would be the period to the first available date on which every seat was not sold to the requested destination at the time the program member requests a reservation.

Comment: All of the airlines that met with the Task Force stated that they intended to retain the right to impose capacity controls, in the future, to limit the number of seats available to consumers purchasing tickets with frequent flyer award certificates. The imposition of capacity controls, including blackout dates, has the potential for unreasonably restricting the supply of seats or other benefits in such a way as to significantly devalue the awards due vested program members. NAAG found that this potential limitation has not been adequately disclosed to program members in the frequent flyer promotional materials we reviewed. This Guideline puts the airlines on notice as to what information they should provide to consumers if they want to impose capacity controls on the use of frequent flyer awards at some future date.

In earlier drafts of the Guidelines the Task Force took the position that capacity controls could not be applied to awards based on any mileage or credits accrued by vested members before they received adequate notice that capacity controls could be imposed. However, as a compromise, and to permit the airlines

reasonable flexibility around holiday or other peak travel times, the revised Guideline provides for a reasonable time to accommodate passengers with award tickets: a 31-day "time window"—15 days before and 15 days after the date requested for ticketing. This "time window" allows the airlines to allocate capacity to meet demand over a reasonable, yet defined period of time. In the event all flights to a certain destination are sold out during the entire 31-day time window, ticketing on the next available seat would be reasonable. This approach has the additional benefit of being simple and straightforward to implement with less possibility of customer confusion and frustration.

3.1 Program changes affecting vested members

1. Any airline or program partner that has not reserved the right to make future changes in the manner required by Sections 3.2 and 3.9 of these Guidelines and that changes any aspect of its program (for example, imposition of capacity controls, increases in award levels, or any other mechanism whereby a vested member's ability to redeem any award will be adversely affected) must protect vested program members. Examples which meet this Guideline are:

(a) All vested members may not be adversely affected by that change for a reasonable period would be one year following mailing of notice of that change.

(b) The airline or program partner may allow vested members to lock in any award level which is in effect immediately preceding any change in the program. That award level

would be guaranteed for a period of one year after mailing notice of any increase in award levels. A vested member would also be permitted to change his or her selection to lock in a different award in existence at any time prior to an increase in award levels.

(c) The airline or program partner may credit vested program members with miles or other units sufficient to assume that, at the time of any change in the program, the member will be able to claim the same awards he or she could have claimed under the old program.

Comment: This Guideline institutes corrective measures to protect vested members and the mileage they accrued before receiving adequate notice that a program could change to their detriment at some point in the future. The Guideline sets forth three acceptable alternative approaches to allow airlines to change existing programs without unreasonably altering the rights and expectations of vested members. For example, an airline may wish to create a new program with higher award levels for persons who join in the future. Guideline 3.1.1(a) grandfathers in vested members for a one-year period after notice. Guideline 3.1.1(b) grandfathers only a specified locked-in award for a one-year period after the effective date of the change and thereby gives the member an additional year to accrue mileage or units toward a specific award. Guideline 3.1.1(c) allows the program to avoid the administrative problems of distinguishing between old and new members and old and new award levels by equitably adjusting the award levels of the vested members.

These examples are not the only ways in which airlines can reasonably protect vested members when changing existing programs. They are intended to delineate minimum acceptable standards.

3.2 Notice of Changes

1. Adequate notice of changes in current frequent flyer program award levels must be provided to vested program members by the airline or program partner to allow a reasonable time for the vested member to obtain and use an award. For example, a notice no less than one year prior to the effective date of such change would be reasonable. Reduction in award levels would not require such notice.

2. Any airline which has a policy of deleting program members from its mailing list for notices and statements must clearly and conspicuously disclose that policy in plain language in its rules and regulations.

3. To reserve the right to make future changes in the award levels and program conditions or restrictions in a manner providing reasonable notice consistent with state law, which notice is less than the notice set forth in Guideline 3.2.1, an airline must first clearly and conspicuously disclose that reservation and the nature of such future changes, in plain language. This disclosure should include examples which make clear the outer limits within which program awards may be changed. For example, the following is not adequate disclosure:

> "Program rules, regulations and mileage levels are subject to change without notice."

This example is adequate disclosure:

> "(Airline) reserves the right to terminate the program with six months notice. This means that regardless of the amount you participate in

this program, your right to accumulate mileage and claim awards can be terminated six months after we give you notice."

Or:

"(Airline) reserves the right to change the program rules, regulations, and mileage level. This means that (Airline) may raise mileage levels, add an unlimited number of blackout days, or limit the number of seats available to any or all destinations with notice. Program members may not be able to use awards to certain destinations, or may not be able to obtain certain types of awards such as cruises."

Or, if the airline so intends, the disclosure might also say:

"In any case, (Airline) will make award travel available within — days of a program member's requested date, except for blackout dates listed here."

The airline's right to make future changes, in a manner other than that provided in Guideline 3.1, shall apply only to mileage accrued after members receive the notice required by this Guideline.

Comment: In the past, airlines have attempted to reserve the right to make radical future changes in their programs by using such vague and uncertain blanket language as "Subject to additions, deletions, or revisions at any time." The consumer outrage that ensued when several of the major airlines attempted unilaterally to change their programs in the winter of 1986-87 makes it clear that consumers were not adequately told, when they joined and participated in frequent flyer programs, that they were taking a

gamble that the award they were striving for would still be available, at the mileage level originally advertised by the time they accrued the necessary miles. To avoid a recurrence of this same problem in the future, this Guideline provides that the potential for such extensive program changes must be clearly and conspicuously disclosed to the public by specific example. It also puts the airlines on notice that (1) their previous attempts to disclose this critical information have been inadequate, (2) if they intend to reserve the right to make such changes in the future, they must give members new and different notice, and (3) as to vested members, airlines cannot implement any adverse changes until one year after notice is given. One year is deemed reasonable because many consumers can only travel during particular periods of the year due to work or family constraints, and therefore notice of less than a year may impact unduly harshly on a particular class of program members.

If an airline wants to reserve the rights to change the terms of its program without giving its members one year's notice (1) it can do so only after clear and adequate notice has been given to the program members and (2) this reduced standard can apply only to mileage accrued after clear and adequate notice has been given.

NAAG discovered that many airlines delete program members from their mailing lists if they are determined to be "inactive." Inactive is defined differently by each airline, but generally includes some formula requiring active participation in the program within a six to ten month period prior to any given mailing. Because crucial information regarding changes is included in program mailings, the

Guidelines require that any airline with a policy of deleting program members from its mailing list clearly and conspicuously disclose that policy in the rules and regulations distributed to all program members when they join.

3.3 Fare or passenger class limitations

Any limitation upon the type or class of fare with which an upgrade certificate, discount flight coupon, or free companion coupon may be used must be clearly and conspicuously disclosed before the program member claims the award. Disclosure of the fare by airline terminology (for example, "Y Class") is not deemed sufficient.

Comment: Many airlines are encouraging consumers to use their accrued mileage or credits to obtain upgrade certificates or free campaign coupons, rather than free tickets because this is more cost effective for the airlines. Many of these coupons and certificates can be used only in conjunction with a regular coach fare ticket. Because of the high cost of a full coach ticket (often disclosed only as "Y Class") many of these coupons and certificates represent no real savings and therefore are useless to consumers. This Guideline requires that any such restriction be clearly disclosed to consumers before the award is claimed.

3.4 Certificates issued for vested miles

Certificates, coupons, vouchers, or tickets issued by an airline for awards redeemed for vested miles must be valid for a reasonable period of time. One year is deemed to be reasonable. Any restrictions on use, redeposit, extension, or re-issuance of certificates must be clearly and conspicuously disclosed on the

certificate and in any rules, regulations, newsletter or other program materials.

Comment: Again, because many consumers may only travel during certain periods of the year, fairness requires that awards be valid for at least a full twelve month cycle.

3.5 Fees

Any airline which charges a fee for enrollment in its frequent flyer program must fully disclose at airline ticket counters and in all advertisements, solicitations or other materials distributed to prospective members prior to enrollment all terms and conditions of the frequent flyer program. Such disclosure must be made prior to accepting payment for enrollment in the airline's program.

Comment: Some airlines have required that consumers fill out a membership application and pay a membership fee before obtaining a copy of the program rules and regulations. Because of the serious restrictions that can apply to a travel reward program, it is essential that all consumers have an opportunity to review all of the program rules and regulations before paying an enrollment fee.

3.6 Redemption time

All airlines must disclose clearly and conspicuously the actual time necessary for processing award redemption requests where such requests are not normally processed promptly. An example of prompt processing would be within 14 days of processing the request. An example of a disclosure would be "processing of awards may take up to 30 days."

Comment: The airlines indicated that full disclosure of redemption time will not be a problem.

3.7 Termination of program affecting vested members

In the event a frequent flyer program is terminated, adequate notice of termination must be sent to all vested members so that vested members have a reasonable time to obtain awards and use them. Adequate notice would be notice at least one year prior to the termination of the program. Award levels in existence prior to such notice should remain in effect for one year. Program members should then have one year to use certificates, coupons, vouchers or tickets. Any applicable capacity controls should be modified as necessary to meet the demand for all award benefits due program members.

Comment: The airlines uniformly take the position that because participation in travel reward programs is "free," an airline should be able to terminate a travel reward program at any time without notice. NAAG strenuously disagrees. Consumers pay significant consideration for the airlines' promise to award them "free tickets" and other awards. Program members fly on a particular airline to accrue mileage in a travel reward program often foregoing a more convenient departure time, a more direct flight, and even a less expensive ticket. Those consumers who kept their part of the bargain have a right to expect the airlines to keep theirs, regardless of the cost. This Guideline affords consumers reasonable protection against unilateral changes. It gives consumers one year to accrue the mileage to reach a desired award level and one year to use the award.

This Guideline is intended to apply to programs that are terminated due to mergers or for any other reason. It would be unconscionable to permit airlines, which have reaped the rewards of these travel incentive programs, to walk away from their obligations to consumers under any circumstances.

3.8 Restrictions

All material restrictions on frequent flyer programs must be clearly and conspicuously disclosed to current program members and to prospective members at the time of enrollment.

Comment: This Guideline is intended as a corrective measure. Any airline that has not clearly and conspicuously disclosed material program restrictions to vested members should do so now. New members are entitled to full disclosure at the time of enrollment.

3.9 Method of disclosure

Disclosures referred to in these Guidelines should be made in frequent flyer program solicitations, newsletters, rules, and other bulletins in a clear and conspicious manner so as to assure that all program members receive adequate notice. As used in these Guidelines, disclosure also refers to information on program partners.

Comment: The brochures containing the rules and regulations for airlines' frequent flyer programs have been as long as 52 pages. Extremely important restrictions are often buried under inappropriate topic headings or hidden on the back of the last inside pages of the brochure. This Guideline requires that restrictions be disclosed in reasonable print size in a location that will be most helpful and informative to consumers.

Any reservation of the right to make future changes in a program is so significant to consumers that it should be disclosed prominently to insure that the

maximum number of people see and read this restriction. The Guideline permits the airlines flexibility to determine when and how often a disclosure must be made so long as the airline discloses the information in a manner which gives meaningful notice to all affected members.

One airline complained that Guideline 3.9 is unreasonable because it proposes that all the restrictions be disclosed at the beginning of the program brochure. In fact, the only disclosure the Guidelines suggested listing at the beginning of a brochure is the reservation of the right to change the program prospectively. The significance of such a restriction —that the terms and conditions of the program can change at any moment—is so critical that potential members should be made aware of it immediately. All other disclosures can be made in the text of the brochure.

Section 4—Compensation for Voluntary Denied Boarding

4.0 Disclosure of policies

If an airline chooses to offer ticketed passengers incentives to surrender their tickets on overbooked flights, the airline must clearly and conspicuously disclose all terms and conditions of the proposal—including any restrictions on offers of future air travel —to the person to whom the offer is made, and in the same manner in which the offer is made, before the person accepts the offer.

Comment: Federal regulations offer specific protections and certain rights to individuals who are involuntarily bumped from a flight. Airlines, however, are free to offer whatever compensation they

want to people who voluntarily give up their seat on an airplane because of overbooking. For economic reasons, airlines prefer to offer vouchers good for free tickets on future flights, instead of cash compensation to these passengers.

While these vouchers may seem very attractive to a consumer who has the flexibility to wait for a later flight, many carry serious restrictions on their use or are subject to lengthy black out periods when they cannot be used.

This Guideline requires that airlines fully disclose any and all restrictions on offers for future air travel, before a consumer agrees to give up his or her seat. It does not, as several airlines and government agencies argued in their responsive comments, set any standards for the type of compensation that airlines must offer to these passengers.

CONCLUSION

Consumer dissatisfaction with the airline industry has reached crisis proportions. Federal agencies have focused their attention on airilne scheduling problems, on-time performance, safety, and other related issues, but have not addressed airline advertising and frequent flyer programs. Unchecked, the airlines have engaged in practices in these areas that are unfair and deceptive under state law. The individual states through NAAG can play an important role in eliminating such practices through these Guidelines.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

C.A. No. A 89 CA 0067

TRANS WORLD AIRLINES, INC.,
CONTINENTAL AIRLINES, INC. AND
BRITISH AIRWAYS PLC, PLAINTIFFS

v.

JIM MATTOX, Attorney General of the
State of Texas, DEFENDANT

[Filed Jan. 25, 1989]

COMPLAINT

Plaintiffs Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental") and British Airways Plc ("British Airways"), by their attorneys, allege for their complaint on knowledge as to themselves and their own acts and on information and belief as to all other matters, as follows:

THE PARTIES

1. Plaintiff TWA is a corporation organized and existing under the laws of Delaware with its principal place of business at Mount Kisco, New York. As a certificated air carrier, TWA is subject to extensive regulation concerning routes, fares and services by the United States Department of Transportation ("DOT"). TWA advertises its routes, rates and services in newspapers, on radio or television, and in other media available to the public.

2. Plaintiff Continental is a corporation organized and existing under the laws of Delaware with its principal place of business at Houston, Texas. As a certificated air carrier, Continental is subject to extensive regulation concerning rates, routes, and services by the DOT. Continental advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

3. Plaintiff British Airways is a corporation organized and existing under the laws of England and Wales with its principal place of business at Heathrow Airport in Hounslow, Middlesex, England. As a holder of a foreign air carrier permit, British Airways is subject to extensive regulation concerning rates, routes, and services by the DOT. British Airways advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

4. Defendant Jim Mattox is the Attorney General of the State of Texas and is sued in his official capacity. The Attorney General is responsible for enforcing the various provisions of Texas law at issue herein.

JURISDICTION AND VENUE

5. This action arises under the Supremacy Clause, Commerce Clause, Compact Clause and the First Amendment of the Constitution of the United States, the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301 *et seq.* (the "Federal Aviation Act"),

and the regulations and orders promulgated thereunder by the DOT, and is therefore within the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331

6. Venue is properly laid before this Court pursuant to 28 U.S.C. § 1391 because Attorney General Mattox is a resident of and maintains his office in this district and because Plaintiffs' claims for relief arose in this district. Attorney General Mattox, in concert with numerous other states' attorneys general, has acted through the National Association of Attorneys General (NAAG) to develop and issue NAAG's Air Travel Industry Enforcement Guidelines ("Guidelines"). The threatened enforcement of these Guidelines by Attorney General Mattox, on behalf of himself and other attorneys general in concert, gives rise to this Complaint.

NATURE AND BACKGROUND OF THIS ACTION

7. This is an action for: (i) a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring that any threatened implementation or enforcement of the Guidelines through Texas Bus. & Com. Code §§ 17.41 *et seq.*, against plaintiffs is unconstitutional insofar as applied to plaintiffs' conduct relating to rates, routes or services, including their advertising and marketing practices relating thereto, with specific reference to the advertisement of fuel, tax and other surcharges; and (ii) preliminary and permanent injunctive relief, pursuant to 28 U.S.C. § 2202 and this Court's inherent equitable powers, enjoining and restraining the implementation of the Guidelines by or on behalf of or in concert with the Attorney General of Texas through enforcement of Texas Bus. & Com. Code §§ 17.41 *et seq.*, with respect to Plaintiffs'

conduct relating to rates, routes or services, including their advertising and marketing practices relating thereto, with specific reference to the advertisement of fuel, tax and other surcharges.

8. Pursuant to the Federal Aviation Act, the DOT and its predecessor, the Civil Aeronautics Board ("CAB"), promulgated extensive rules and regulations governing activities related to air transportation by air carriers and foreign air carriers. These extensive federal rules and regulations relate, *inter alia*, to unfair and deceptive practices in the airline industry, including standards governing price advertising.

9. Congress expressly granted the CAB the authority to promote the public interest through the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . ." 49 U.S.C. § 1302(a)(7). Not only did Congress specifically prohibit such practices, it further authorized the CAB in Section 411 of the Federal Aviation Act to determine whether any air carrier or foreign air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." 49 U.S.C. § 1381. In the event that the CAB finds that a carrier "is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier to cease and desist. . . ." *Id.*

10. Also, in amending the Federal Aviation Act by the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705, Congress provided in Section 105, 49 U.S.C. § 1305, that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any [interstate] air carrier." 49 U.S.C. § 1305(a)(1).

11. Acting pursuant to Congressional authorization, the CAB promulgated regulations governing unfair, deceptive, predatory or anti-competitive practices, 14 C.F.R. Part 399, and particularly pertaining to price advertising, 14 U.S.C. § 399.84. Because the Airline Deregulation Act of 1978, *supra*, would otherwise have limited substantially CAB and DOT authority over unfair or deceptive practices related to air transportation beginning in 1985, Congress acted affirmatively in the CAB Sunset Act of 1984, P.L. No. 98-443, 98 Stat. 1703, to reserve all federal authority over these practices. In the CAB Sunset Act, 49 U.S.C. § 1551, Congress transferred "the CAB's authority under Section 411 of the [Federal Aviation] Act, to prevent unfair or deceptive practices" to the DOT. H.R. Rep. Conf. No. 98-1025, 98th Cong., 2d Sess. 15, *reprinted in* 1984 U.S. Code & Admin. News 2857, 2876. Congress' explicit reason for deciding that "there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices" was, *inter-alia*, that such Federal Aviation Act authority:

> insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2860.

12. On information and belief, NAAG is a voluntary association comprised of representatives of the

attorneys general of the fifty states, the District of Columbia, and of various territories. In June 1987, defendant Attorney General Jim Mattox co-sponsored a resolution directing the appointment of a NAAG task force to study the advertising and marketing practices of the airline industry in the United States. The task force was directed to recommend a course of action to NAAG members with respect to alleged consumer concerns in the areas of airline advertising practices, frequent flyer programs, and compensation for denied boarding.

13. The NAAF task force subsequently developed the Guidelines, which purportedly address advertising and marketing practices in the airline industry. (A copy of the NAAG Guidelines is attached as Exhibit "1" in the separately bound Appendix (hereinafter "Appendix") that accompanies this Complaint and Plaintiffs' Memorandum in Support of Plaintiff's Motion for Temporary Restaining Order). According to NAAG, the Guidelines did not establish new laws but were intended to serve as "prosecution guidelines to be used by the states in interpreting their own laws."

14. In September 1987, NAAG circulated a draft of its proposed Guidelines to major airlines, the DOT, and the United States Federal Trade Commission ("FTC"). The comments received from these entities recommended against adoption of the Guidelines. For example, the FTC stated that the task force should refrain from recommending the draft Guidelines and reminded NAAG that the "Federal Aviation Act specifically preempts state regulation of airline rates, routes, or services." Appendix, Exhibit "2" at 2. Similarly, the DOT, in a letter from its General Counsel dated October 19, 1987, stated that "a number of the recommendations appear to be

preempted by the Federal Aviation Act (49 U.S.C. § 1301 *et seq.*) or Department of Transportation (DOT) rules or would unduly burden interstate commerce." Appendix, Exhibit "8" at 1.

15. Notwithstanding these objections, on or about December 12, 1987, NAAG adopted final enforcement Guidelines, stating that they would "serve to advise the airline industry which conduct is permitted and what is prohibited."

16. The Guidelines cover three principal areas. First, they require all advertisements of fares to disclose in a prominent fashion all material conditions connected with the purchase of tickets, specify the manner in which such disclosures should be made, and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised fares. Second, the Guidelines purport to regulate certain terms and condiitons of frequent flyer programs. Finally, the Guidelines direct airlines to disclose all terms and conditions of incentives offered to induce passengers to give up their seats on overbooked flights.

17. Although the Guidelines themselves do not have the force of law, NAAG considers them to be interpretations of already existing state laws dealing with unfair and deceptive practices. Indeed, NAAG has asserted that the Guidelines represent "minimally necessary" regulatory requirements. Subsequently, various state attorneys general acting in concert have taken the position that the Guidelines are proper interpretations of their existing state laws and that they will implement or enforce the Guidelines against air carriers through their various state laws.

18. Following actions by a number of state attorneys general seeking to enforce compliance with

the full price advertising and roundtrip pricing sections of the Guidelines, the DOT, acting through its general counsel, sent a letter dated March 2, 1988, to Attorney General Jim Mattox indicating that "[b]oth of these matters are clearly preempted by Federal law." Appendix, Exhibit "9" at 1. The DOT noted that, applying Setcions 204 and 411 of the Federal Aviation Act, 49 U.S.C. §§ 1324, 1381, the CAB adopted a rule that requires full prive advertising for all components of the advertised air transportation. Since assuming jurisdiction from the CAB for this rule, the DOT has specifically permitted the type of advertising to which the Guidelines object.

19. One state attorney general who has indicated his intent to take enforcement action implementing the Guidelines' fare advertising provisions is defendant Jim Mattox, the Attorney General of the State of Texas. Acting in his official capacity and in concert with other state attorneys general, Attorney General Mattox, through authorized agents of the Office of the Attorney General of Texas, has threatened to institute enforcement proceedings against plaintiffs if their advertising practices do not conform to the Guidelines. Specifically, on November 14, 1988, Stephen Gardner, Assistant Attorney General of the State of Texas, acting on behalf of the States of Texas, California, Massachusetts, New York, and Washington, wrote a letter to various airlines, including plaintiffs, to reaffirm the position of such states that "any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (Copies of Mr. Gardner's substantially identical letters to plaintiffs TWA, Continental, and British Airways are attached to the Affidavits of Tracy Britton, John Power, and John Williams, which are

Exhibits B, E and G, respectively, to Plaintiffs' Motion for Temporary Restraining Order, which accompanies this Complaint.) Although Mr. Gardner's letter does not expressly refer to the Guidelines, the letter duplicates section 2.5 of the Guidelines, which states that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (*Id.*) Thus, it is clear that Attorney General Mattox seeks to implement or enforce section 2.5 of the Guidelines through state law.

20. Mr. Gardner's letter indicated that, absent alteration of the advertising, the states would initiate enforcement actions under their respective state laws. It also stated that to allow time to bring the challenged advertising into compliance, no action would be taken until after November 30, 1988, and that any advertisement which appears prior to December 1, 1988, would not be the subject of legal action unless a so-called "deceptive" advertisement appears on or after December 1. Mr. Gardner described his letter as a "formal notice of intent to sue" and as "the final opoprtunity to cure your [alleged] violation of the state laws." (*Id.*)

FIRST CLAIM FOR RELIEF

(Preemption by the Federal Aviation Act, as amended)

21. Plaintiffs repeat and reallege paragraphs 1-20 as if fully set forth herein.

22. Section 105(a) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), as amended by the Airline Deregulation Act of 1978, *supra*, expressly preempts any state law, rule or regulation relating to airline

rates, routes or services. It provides in pertinent part:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this Act to provide interstate air transportation.

23. Congress' purpose in enacting Section 105 was to prevent conflicts and inconsistent state regulations from being imposed on air carriers and to preclude the states from impeding Congress' decision to deregulate the airline industry. Congress' express intent was to encourage, develop and attain a uniform air transportation system which relies on competitive market forces to determine the quality, variety and price of airline services. To promote uniformity, the DOT was given the sole responsibility for regulating air carriers in any matters relating to routes, rates or services. Because of the DOT's expertise in air transportation matters, Congress vested it with exclusive authority to administer all consumer-related functions in these enumerated areas.

24. Additionally, Section 411 of the Federal Aviation Act prohibits deceptive or unfair practices and specifically authorizes the DOT, as the CAB's successor, to:

> investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in

such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1381(a) (Section 411).

25. In the CAB Sunset Act of 1984, Congress transferred the CAB's existing authority under Section 411 to the DOT. 49 U.S.C. 1551(b). Congress confirmed that such authority was intended to "insure[] a uniform system of regulation and preempts regulation by the states." H.R. Rep. 98-793, 98th Cong., 2d Sess. 4, *reprinted* in 1984 U.S. Code Cong. & Admin. News 2857, 2860.

26. The DOT has enforced Congress' preemption in Section 105 by regulating all economic factors that go into the provision of a *quid pro quo* for passengers' fares, such as flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing. The DOT also has expressly indicated that it intends to occupy this field completely pursuant to Congress' direction in Section 105.

27. The DOT has also consistently exercised its enforcement authority under Section 411. Likewise, the DOT, through its General Counsel, has interpreted Section 411 and its implementing regulations, 14 C.F.R. Part 399 and DOT Orders 85-12-68, 88-3-25, and 88-8-2, as preempting regulation by the states of allegedly deceptive or unfair price advertising practices covered by the Guidelines. (Certified copies of the referenced DOT orders appear in the Appendix as Exhibits "5", "6", and "7" respectively.)

28. The NAAG Guidelines directly conflict with Congressional action and intent by seeking to regulate an airline's allegedly deceptive advertising of its rates, routes and services. *See* 14 C.F.R. § 399.84 DOT Orders 85-12-68, 88-3-25 and 88-8-2. (Appendix Exhiibts "5", "6", and "7.") Therefore, the Guidelines and any threatened enforcement actions are expressly preempted by federal law.

29. The three broad areas which are covered by the Guidelines—fare advertising, frequent flyer programs, and denied boarding compensation—and which Attorney General Jim Mattox is threatening to enforce through Texas Bus. & Com. Code §§ 17.41 *et seq.* are all directly related to price advertising, 14 C.F.R. § 399.84, and are integrally "related to rates, routes and services." Indeed, NAAG has expressly acknowledged that one likely effect of the Guidelines will be to cause airlines to eliminate substantive conditions associated with discount fares because of the onerous and unlawful disclosure requirements which the Guidelines impose. Furthermore, given the Guidelines' complicated disclosure requirements, it is likely that airlines will place less broadcast advertising of their air fares than is now the case. The consequential loss of the ability to effectively publicize fare reductions will remove airlines' incentive to cut fares. Thus, Sections 105 and 411 mandate the preemption of the Guidelines as they are enforced through state law, including Texas Bus. & Com. Code §§ 17.41 *et seq.*

30. Even absent Sections 105 and 411, the Guidelines construed in conjunction with Texas and other state law are preempted due to the uniform federal regulatory scheme that governs airline advertising, particularly of international rates, routes and services. The scheme of federal regulation leaves no room for supplementary state regulation of allegedly de-

ceptive advertising of an airline's rates, routes and services.

31. The Federal Aviation Act, as amended, and the DOT's implementing regulations, interpretations and practices, comprehensively deal with fare advertising, frequent flyer programs and denied boarding compensation. State enforcement activity in the areas that attempt to dictate acceptable modes of business activity by the plaintiffs cannot co-exist with federal law on the same subjects, because it stands as an obstacle to implementing Congress' express decision to deregulate the domestic industry as a matter of national policy.

32. Certain provisions of the Guidelines as construed in conjunction with Texas state law are preempted for the additional reason that they conflict in words or in effect with existing federal law. Specifically, pursuant to the requirements of international agreements between the United States and other sovereign nations, and of Section 403 of the Federal Aviation Act, 49 U.S.C. § 1373, plaintiffs must file tariffs for their foreign flight schedules:

> Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it. . . . Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe. . . .

49 U.S.C. § 1373. Thus, tariffs are expressly required by federal law and permitted to be advertised by Section 403. However, because the tariffs list separately the component parts of the air fares, the

Guidelines would prohibit their advertisement contrary to express requirements of federal law. Also, subsections 2.5 and 2.6 of the Guidelines require surcharges to be included in the total price advertised and prohibit the advertisement of one-way fares based on a roundtrip purchase only. Those subsections are in direct conflict with 14 C.F.R. § 399.84 and DOT interpretations thereunder such as Orders 85-12-68, 88-3-25 and 88-8-2 (Appendix, Exhibits "5", "6", and "7"), which expressly permit such advertising practices. Indeed, the entire effect of Section 2 of the Guidelines is to decrease or eliminate price competition by airlines, competition which is essential to the success, and indeed is the paramount goal, of the deregulated air transportation market mandated by the Federal Aviation Act, as amended.

33. Under the Supremacy Clause of the United States Constitution, the Guidelines construed in conjunction with Texas Bus. & Com. Code §§ 17.41 *et seq.* or with any other states' laws, are unconstitutional and may not be enforced against plaintiffs.

34. Plaintiffs are incurring unascertainable but real costs and competitive disadvantages by complying with the Guidelines under duress. To the extent the Guidelines restrict advertisements that are expressly required or permitted by Federal statute and regulation, they constitute an impermissible infringement of constitutional rights protected by the Supremacy Clause. Plaintiffs have no adequate remedy at law and have been and will continue to be directly and irreparably harmed if an injunction is not issued.

SECOND CLAIM OF RELIEF
(Violation of Commerce Clause)

35. Plaintiffs repeat and reallege paragraphs 1-34 as if fully set forth herein.

36. Plaintiffs are involved in interstate commerce and also engage in foreign commerce. They engage in the advertising of their services in the various states and have customers who purchase their services in the various states and internationally.

37. Implementation or enforcement of the Guidelines through various state laws, including Texas Bus. & Com. Code §§ 17.41 *et seq.*, and as applied to plaintiffs' interstate and international activities, imposes direct and excessive burdens on foreign and interstate commerce.

38. Unless the Court acts to restrain the threatened enforcement against plaintiffs of Texas Bus. & Com. Code §§ 17.41 *et seq.*, as construed in accordance with the Guidelines, plaintiffs will be faced with undue and impermissible burdens on their ability to engage in interstate and foreign commerce as a result of the potential for contradictory regulatory obligations imposed by states whose standards differ, or may differ, from those of Texas.

39. Plaintiffs now will be subject to multi-tiered regulations, with conflicting demands imposed by the DOT, the State of Texas and a possible multitude of conflicting state regulations caused by the differing interpretation of the Guidelines by other NAAG members. For example, the Attorney General of New York has a different interpretation from Attorney General Mattox, and another NAAG member, the Attorney General of New Mexico, objects to the Guidelines. Such varying enforcement positions by the NAAG members run counter to Congress' intention of avoiding confusion and inconsistent regulation of the airline industry by providing the DOT with pre-emptive authority in this area.

40. Moreover, to the extent that plaintiffs can run advertisements in compliance with all the different laws of the various states, the exacting detail the Guidelines require to be disclosed will cause the number of such advertisements to decline. This, in turn, will decrease price competition in the industry, a result directly contrary to Congress' stated national polciy, as embodied in the Airline Deregulation Act of 1978.

41. Wholly apart from the issue of the potential for conflicting or differing interpretations of the Guidelines, threatened enforcement action by a single large state, such as Texas, will inevitably have interstate effects. Because it is impossible as a practical matter for plaintiffs to tailor advertisements disseminated through interstate media to meet individual state requirements, a single state will inevitably coerce plaintiffs into conforming their national advertising and marketing practices to those requirements; ultimately, such conformance will be to the requirements imposed my the most restrictive jurisdiction.

42. In addition to the adverse effects on interstate commerce which are posed by the threatened actions of Attorney General Mattox under the NAAG Guidelines, there is also the threat of a serious disruption of foreign commerce. By attempting to regulate the manner in which both foreign and domestic airlines provide and market their air transportation services, Attorney General Mattox is intruding into matters involving the foreign commerce and foreign relations of the United States.

43. The regulatory scheme for international aviation involves a complex combination of federal statutes and international agreements, including over eighty treaties and executive agreements between the United States and other sovereign nations. Because international aviation is governed by treaty and executive agreements, there is always the possibility of a conflict between these international agreements and U.S. domestic law, and of friction between the United States and foreign governments should domestic laws be applied inconsistently with the requirements of the United States' international obligations. Congress has recognized this possibility and addressed the problem by directing that U.S. laws and regulations be applied consistently with international agreements. *See* 49 U.S.C. § 1502(a). Furthermore, Congress has reserved for the President the exclusive right to disapprove actions by the regulatory authorities, such as rejection of international tariffs, that might disrupt the foreign relations of the United States. *See* 49 U.S.C. § 1461(b).

44. In the area of international relations and the regulation of foreign trade and commerce, the federal government of the United States must speak with a single voice and act through a single government. Under Article I of the United States Constitution, Congress has the exclusive and plenary power to regulate commerce with foreign nations. Through the Federal Aviation Act of 1958, as amended, Congress has delegated this authority in the area of air transportation to the President and the DOT. They alone may speak for the nation. Consequently, the actions of Attorney General Mattox in threatening to implement and enforce the Guidelines under the Texas law have been taken in derogation of the Constitutional allocation of power to the central government to regulate foreign commerce.

45. Under the Commerce Clause and the Supremacy Clause of the United States Constitution, Texas Bus. & Com. Code §§ 17.41 *et seq.*, and any other states' laws construed in conjunction with the Guidelines, are unconstitutional as applied to plaintiffs and may not be enforced. The pertinent Texas statutes (and any other state laws) construed in accordance with the Guidelines impose an unreasonable and impermissible burden on the flow of interstate and foreign commerce and unreasonably and impermissibly regulate and affect plaintiffs' conduct in such states.

46. Plaintiffs have been threatened with an enforcement action by the Attorney General of Texas and by other states' attorneys general acting in concert with him, unless plaintiffs comply with the Guidelines. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing so under duress and have been and will continue to be immediately and irreparably harmed for so long as this threat continues. Plaintiffs have no adequate remedy at law.

THIRD CLAIM FOR RELIEF
(Violation of Interstate Compact Clause)

47. Plaintiffs repeat and reallege paragraphs 1-46 as if fully set forth herein.

48. The Compact Clause of the U.S. Constitution states in pertinent part as follows:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .

U.S. Const. art. I, § 10, cl. 3.

49. The actions of the Attorney General of the State of Texas and the other members of NAAG in their concerted activities in developing, issuing, and agreeing to enforce the Guidelines through their own states' laws constitute the formation of an illegal agreement or compact among the states. The compact is illegal because it has the effects of both increasing the political power of the states and encroaching substantially on national and international interests that are the exclusive domain of the federal government. Enforcement of the Guidelines clearly encroaches on federal authority "to protect consumers against unfair and deceptive practices" in the air travel industry, as set forth in the legislative history accompanying the CAB Sunset Act of 1984, Pub. L. No. 98-443. H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2860. Congress has not consented to these concerted actions of the states, acting through their respective attorneys general. Because the Guidelines seek to enhance the states' authority *quoad* the federal government, they violate the Compact Clause.

50. Plaintiffs are being irreparably injured as a result of defendant's illegal and unconstitutional interstate compact. Plaintiffs have no adequate remedy at law. Consequently, plaintiffs are entitled both to a declaration that the Guidelines are void and unenforceable, and an injunction preventing any attempt by the Attorney General of Texas, or any NAAG member in active concert or participation with him, from enforcing the Guidelines through their state laws.

FOURTH CLAIM FOR RELIEF
(Violation of First Amendment)

51. Plaintiffs repeat and reallege paragraphs 1-50 as if fully set forth herein.

52. Commercial speech is protected against governmental suppression or undue regulation by the First Amendment of the United States Constitution.

53. If commercial speech concerns a lawful activity and is not inherently misleading or fraudulent, the government may not restrict the manner, form and content of commercial speech unless the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interests, and the restrictions are no more extensive than necessary to serve that interest.

54. Plaintiffs' fare advertisements and other promotional and informational material are commercial speech. That information concerns a lawful activity —the provision of airline services—and is not inherently misleading or fraudulent since it is in conformity with the Orders of the DOT, the federal agency vested with exclusive jurisdiction over consumer protection issues in the airline industry.

55. Neither the state of Texas, nor any other state whose attorney general is actively in concert with Attorney General Mattox, has any cognizable interest in restricting and dictating the manner, form and content of plaintiffs' commercial speech through the application of its respective state laws, including Texas Bus. & Com. Code §§ 17.41 *et seq.*, as construed in accordance with the Guidelines. To the extent that there are substantial government interests in regulating, plaintiffs commercial speech, Congress has delegated the sole responsibility for such regulation to the DOT. In any event, the means of regula-

tion which Texas and its companion states have chosen do not directly advance Texas' or any other states' purported interest.

56. Most importantly, the restrictions and dictates that Texas and other states are trying to force plaintiffs to adhere to under threat of enforcement proceedings are overbroad and far more extensive than are necessary to serve any legitimate Texas state interest. The threatened application of Texas' and other states' laws to plaintiffs in this regard constitutes an unlawful prior restraint and is therefore violative of the First Amendment.

57. The *per se* rules set forth in the Guidelines bear no necessary relationship to whether an advertisement is, in fact, false and deceptive. The Texas Deceptive Trade Practices Act, Texas Bus. & Com. Code §§ 17.41 *et seq.*, as construed by Attorney General Mattox in conjunction with the Guidelines, is overbroad and fails to adhere to the constitutional requirement that it be no more extensive than necessary to serve the government's interest in regulating commercial speech; in this case, a non-existent interest.

58. Plaintiffs' constitutionally protected rights to engage in commercial speech have been and are being illegally chilled and restricted. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing so under duress and have been and will continue to be immediately and irreparably harmed for so long as this continues unchecked. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand that judgment be entered:

(a) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. &

Com. Code §§ 17.41 *et seq.* or any other state law is unconstitutional as applied to plaintiffs under the Supremacy Clause of the United States Constitution, Article VI, cl. 2;

(b) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§ 17.41 *et seq.* or any other state law is unconstitutional as applied to plaintiffs under the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, because those laws impose an impermissible burden on interstate and foreign commerce;

(c) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§ 17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Compact Clause of the United States Constitution, Article I, § 10, cl. 3, because such implementation or enforcement would be the result of an illegal interstate compact that has not been approved by Congress;

(d) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§ 17.41 *et seq.* or any other state law is unconstitutional as applied to plaintiffs under the First Amendment of the United States Constitution, because these laws impermissibly restrict constitutionally protected commercial speech;

(e) preliminarily and permanently enjoining the Attorney General of the State of Texas, Jim Mattox, and all other persons acting for or in active concert or participation with the Attorney General or the State of Texas, from taking any action against plaintiffs pursuant to Texas Bus. & Com. Code §§ 17.41 *et seq.* or any other state law in conjunction with the

NAAG Guidelines as they purport to regulate plaintiffs" rates, routes or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services;

(f) granting plaintiffs the costs and disbursements of this action, including attorney's fees; and

(g) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

C.A. No. A 89 CA0067

TRANS WORLD AIRLINES, INC.,
CONTINENTAL AIRLINES, INC., AND
BRITISH AIRWAYS PLC, PLAINTIFFS

v.

JIM MATTOX, Attorney General of the
STATE OF TEXAS, DEFENDANT

[Filed Jan. 27, 1989]

MOTION OF SPECIALLY APPEARING STATES TO DENY PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR IN THE ALTERNATIVE MOTION TO EXTEND DATE FOR HEARING ON TEMPORARY ORDER

Without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them, the states of Kansas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Okla-

homa, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming specially appear before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order or in the alternative to ask this Court to set a future date upon which to hear plaintiffs' motion as a noticed motion for temporary restraining order.

I.

THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs' motion for a temporary restraining order should be denied because the injunctive relief plaintiffs are seeking could affect the sovereign rights of states which have neither been served nor named as defendants in the instant action. On Tuesday, January 24, 1989, four of the above named specially appearing states (California, Washington, Massachusetts and New York) received notice from the Texas Attorney General's office that Jim Mattox, Attorney General of Texas, had been sued by the plaintiffs herein and that part of the relief being sought by plaintiffs was an injunction which would "(a) preliminarily and permanently enjoin . . . the Attorney General of the State of Texas, Jim Mattox, and all other persons acting for or in active concert or participation with the Attorney General of the State of Texas, from taking any action against plaintiffs pursuant to . . . any other state law in conjunction with the NAAG Guidelines as they purport to regulate plaintiffs' rates, routes, or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services (Complaint at 26).

California, Massachusetts, New York and Washington were further informed that plaintiffs in their action claimed that all the states whose attorneys general belong to the National Association of Attorneys General (NAAG), were acting "in concert" and "participating" with the State of Texas and that plaintiffs' prayer could have the effect of prohibiting such states from enforcing their own laws even though they were not named as defendants nor served by plaintiffs with a copy of the action currently before this Court.

Most of the other 29 states which have specifically appeared to join in this motion did not receive notice of this pending action until Wednesday, January 25, 1989.

The very day that plaintiffs initiated this instant action, oral argument was conducted in the D.C. Circuit in *State of Alaska, et al. v. Department of Transportation*, 88-1348 and 88-1682 (consolidated). In that action, 27 states sued the DOT seeking to reverse the very orders which are at the heart of plaintiffs' action herein. Plaintiffs' pleadings assert that the states lack to right, in their sovereign capacity, to enforce state laws prohibiting false and deceptive advertising. Based on their allegations, plaintiffs are attempting by sleight of hand to effect the rights of states which they have neither named nor had the courtesy of serving with their pleadings. Accordingly, these petitioning states request that this Court deny plaintiffs' motion for a temporary restraining order.

II.

IF THE SPECIALLY APPEARING STATES' REQUEST IS DENIED, THIS COURT SHOULD, IN THE ALTERNATIVE, ADJOURN THIS HEARING FOR A FUTURE DATE

In their pleadings plaintiffs raise issues which sound in Constitutional terms of the highest order- alleged violations of the Supremacy Clause, alleged violations of the Commerce Clause, alleged illegal interstate compacts in violation of the Compact Clause, alleged abridgement of First Amendments rights and alleged preemption. These states seek nothing more than the time necessary to review plaintiffs' voluminous pleadings, briefs, motions, and exhibits; to decide in orderly fashion how and whether to respond to them; and to decide whether to seek leave from this Court to file an Amicus Curiae Brief or to seek leave to intervene. We therefore request this Court to set down plaintiff's motion for a hearing at a reasonable time in the future so as to allow for a more complete hearing on the issues. Such a request is only reasonable.

Plaintiffs claim that the genesis of their action is a NAAG report issued in December, 1987, and a letter they received from the Texas Attorney General's office on behalf of Texas, California, Washington, Massachusetts and New York, which was dated November 14, 1988. Plaintiffs make no allegations of any changed circumstances in either the last thirteen (13) months nor in the last ten (10) weeks which now require this Court to take the drastic action of issuing a temporary restraining order on four days notice to the named defendant state only without giving other, possibly affected, states an opportunity

to present their arguments, if they so desire, to the Court.

If plaintiffs feel that the Texas letter has caused the change in circumstances which requires them to take action, they have had, at a minimum, over ten (10) weeks to prepare their pleadings and documents so they could present their best argument to this Court. In this action, which threatens to affect the ability of states to exercise their police powers, the specially appearing states should also be given adequate time to present their best arguments to this Court.

In the only reported case dealing with the issue of whether a state can enforce its truth in advertising laws against an airline's advertisements of its DOT allowed airfares (*The People of the State of California v. Western Airlines, Inc.* 155 Cal. App.3d 597, 202 Cal. Rptr. 237 (1984), *cert. den.* 469 U.S. 1132 (1985)), the court held that the states could properly exercise their police powers. (*See also, I.C. Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338 (W.D. Pa. 1982) wherein the court held that a private cause of action alleging deceptive airline advertising of a DOT approved rate was not pre-Aviation Act.) While the states believe nothing has happened which would lead to a change in the previous decision, the states need time to review plaintiffs' pleadings in order to determine how best to respond in an appropriate manner.

CONCLUSION

For the above reasons, these specially appearing petitioning states respectfully request that this Court deny plaintiffs' motion for a temporary restraining

order or ask, in the alternative, that a later date be set for a hearing on plaintiffs' motion.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Restraining Order was served on all plaintiffs by hand delivery to their attorney of record on January 27, 1989.

Robert T. Stephan
ROBERT T. STEPHAN

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